

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 3260/19
Applicant: Timothy Ford
Respondent: Asahi Beverages Pty Ltd
Date of Determination: 16 September 2019
CITATION: [2019] NSWCC 299

The Commission determines:

1. The applicant sustained injury on 27 October 2018 arising out of or in the course of his employment with the respondent.
2. The applicant's employment with the respondent was a substantial contributing factor to such injury.
3. The applicant's injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to discipline.
4. The applicant has had no current work capacity since 23 April 2019.
5. The respondent is to pay the applicant \$2,205.75 per week from 23 April 2019 to date and continuing pursuant to s 37(1) of the *Workers Compensation Act 1987*.
6. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the *Workers Compensation Act 1987*.

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

Brett Batchelor
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 BRETT BATCHELOR, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Timothy Ford (the applicant/Mr Ford) seeks weekly benefits from 23 April 2019 to date and continuing as a result of psychological injury sustained on 27 October 2018 arising out of or in the course of his employment with Asahi Beverages Pty Ltd (the respondent). Mr Ford claims that throughout the course of his employment he was subject to ongoing bullying and harassment by both his supervisors and co-workers as a result of which he suffered injury.
2. The respondent denies that the applicant received a psychological injury as required by s 11A(3) of the *Workers Compensation Act 1987* (the 1987 Act), and further denies that the applicant is entitled to compensation because his psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by his employer with respect to discipline under s 11A(1) of the 1987 Act.
3. By way of a notice issued to the applicant under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 26 March 2019, the respondent also does not agree that the applicant is entitled to weekly payments and medical or related treatment for his claimed psychological injury because he does not have total or partial incapacity for work resulting from an injury as required by section 33 of the 1987 Act, and because medical or related treatment is not reasonably necessary as a result of an injury as required by ss 59 and 60 of the 1987 Act.
4. The applicant previously sustained a psychological injury in about 2010 whilst working for the respondent (then trading as Schweppes), when he was bullied by the manager second in charge of the factory. He was off work for about one and a half years before returning to work with the respondent.

ISSUES FOR DETERMINATION

5. The parties agree that the following issues remain in dispute:
 - (a) Did the applicant sustain an injury that is a psychological injury as defined in s 11A(3) of the 1987 Act?
 - (b) Was any psychological injury sustained by the applicant wholly or predominantly caused by reasonable action taken or proposed to be taken by the respondent with respect to discipline under s 11A(1) of the 1987 Act?
 - (c) Has the applicant suffered total or partial incapacity for work as a result of the psychological injury he claims he suffered, in accordance with s 33 of the 1987 Act?
 - (d) Is the applicant entitled to an award under s 60 of the 1987 Act for medical and related treatment as a result of the psychological injury he claims he suffered?

PROCEDURE BEFORE THE COMMISSION

6. 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.
7. The parties attended a conciliation/arbitration on 15 August 2019 and 4 September 2019. Mr B McManamey of counsel appeared for the applicant briefed by Ms C Khoury. The

applicant was present on 15 August 2019 with a support person. Mr P Stockley of counsel appeared for the respondent briefed my Ms J Nicholls. A representative of icare was in attendance on 15 August 2019.

EVIDENCE

Documentary Evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents (the Application);
 - (b) Reply and attached documents, and
 - (c) Email dated 27 October 2018 at 6.37 am from Catherine Olima to Ros Cluning and Ron Mudlar incorporating email dated 27 October 2018 at 5:26:47 am AEDT from Daniel Milburn to Catherine Olima and others – Exhibit 1 in the respondent's case (also at p 186 Reply).

Oral Evidence

9. There was no application to adduce oral evidence or cross-examine the applicant.

THE APPLICANT'S CASE

10. The applicant's evidence is contained in two statements dated 15 November 2018¹ and 24 May 2019². In [6] of the latter statement, Mr Ford confirms the contents of his "previous statement by the investigator, dated 9 November 2018" [sic, 15 November 2018].
11. In the statement dated 15 November 2018 the applicant details 10 allegations when he says that he:
 - (a) was threatened by Jeff Joseph, the acting team leader in 2014 (Allegation 1);
 - (b) was ill treated by Jeff Joseph, who he alleged was showing favouritism to certain co-workers and not himself (Allegation 2);
 - (c) was spoken to in an aggressive manner by Ranil when he reported to this person about the performance of another worker (Allegation 3);
 - (d) was fobbed off by Jeff Joseph and spoken to in an aggressive tone by Ranil when he reported that there were no PPE gloves in the cupboard (Allegation 4);
 - (e) was spoken to in a degrading manner by Ranil in a June 2018 meeting with Roz Clooney (HR) and Ranil when he raised allegations that he had been harassed and bullied by another co-worker (Allegation 5);
 - (f) attended a two hour meeting in June 2018 with Michael Carney, Rakesh (the former factory manager) and Steve Smith (the applicant's uncle as a support person) where he made further complaints about the treatment by Jeff Joseph, and the requirement that he was used to train casuals, even though he was the most experienced operator (Allegation 6). As a result of this meeting, the

¹ Application p 2.

² Application p 15.

applicant was placed on afternoon shift so that he did not have to interact with staff on the day or night shift because of problems he was having with them;

- (g) suffered aggression directed towards him by Daniel, contract team leader, (Allegation 7);
 - (h) attended a meeting on 28 August 2018 (“five times” according to the applicant) with Ranil in respect of continued ill treatment by Ranil, Jeff (Joseph) and Danial, and the isolation he felt from the team (Allegation 8);
 - (i) suffered abuse from Craig Thomas, the dayshift union delegate, following a verbal complaint that he made to Roz Clooney about another employee sleeping on the shift and attending late to work (Allegation 9), and
 - (j) was involved in an incident when working on the packer machine with Chandra, when they both were caused to get grease all over their shirts because the machine should not have been greased a week earlier by Robbie Mackay. Subsequently the applicant unintentionally hosed Robbie Mackay when he walked up to the machine and opened its door (Allegation 10).
12. On 27 October 2018 the applicant terminated his shift at 3.30 pm as he was feeling depressed and could no longer function at work. Prior to leaving work he was handed a letter by Daniel that contained a request that he attend a meeting on 31 October 2018 to discuss conduct concerns. When the applicant got home, he telephoned Michael Carney and told him about the letter who said to him “*they’re setting you up*”, and “*leave it with me*” in response to Mr Ford’s query as to what he was supposed to do.
 13. The request to attend a meeting on 31 October 2018 was in respect of the incident (alleged to have occurred on 25 October 2018) when the applicant was said to have purposely soaked Robbie Mackay with a hose and deliberately applied water to intricate parts of the machine that should not have been exposed to any moisture; this caused the C4 line two and a half hours downtime.
 14. The applicant attended on his general practitioner, Dr Sorani on 29 October 2018 who issued a WorkCover certificate of capacity, specifying depression, which contained a certification deeming the applicant unfit to work until 15 November 2018. Mr Ford was referred to “Velimir” at Life Resolutions, Liverpool for counselling and to Dr Hewa Atatuu [sic, Atapattu], psychiatrist.
 15. The applicant did not attend the meeting on 31 October 2018 and has not returned since.
 16. Earlier in his statement dated 15 November 2018 (at [28] - [29]) the applicant referred to another incident in March 2018 when he was accused that he harassed and bullied a co-worker over a request for this worker to drive a forklift when Mr Ford did not have his licence on him. The co-worker took offence over a comment made by the applicant as to his manner of driving and lodged a formal complaint. The applicant was informed that night that there would be an investigation into his conduct.
 17. In June 2018 the applicant received a letter couriered to his house advising that the investigation had been concluded and that the allegations of bullying and harassment had been made out, that these constituted a breach of company policy in relation to inappropriate conduct and that he would be formally counselled. The applicant did not receive any formal counselling.
 18. In his statement dated 24 May 2019 the applicant gave details of his treatment since ceasing work with the respondent, referred to a previous medical condition in 2010 when he says he was bullied at work, received treatment and eventually returned to work and made further

reference to a number of the allegations referred to in the statement dated 15 November 2018.

19. He also expanded on several of the 10 allegations he referred to in his earlier statement. In respect of allegation 10 referred to in [11 (j)] above, the applicant said that when he was handed a letter by Daniel as he was leaving work on 27 October 2018, Daniel asked to meet him directly regarding the hose incident. However Mr Ford stated that he did not know the contents of the letter “until before I had left work” (see [22]). He went on to say that Daniel was always confrontational and aggressive towards him, causing him to become overwhelmed. He reached breaking point in the cafeteria, which he said was as a result of years of bullying and he finally felt something inside him snap. In his state, the applicant kicked the table over and threw a chair. He said that he was not targeting anything and did not damage any property. He said that he felt so angry and that he was being treated unfairly.
20. Mr Ford said he discovered the contents of the letter when he was in the carpark. He said that it accused of him of causing thousands of dollars’ worth of damage to the machine, which he knew to be false. He confirmed that his actions did not warrant the discipline review for which he received notice as he had followed the company protocol and guidelines. He said he experienced a panic attack as he was reading the contents of the letter.
21. In that statement dated 24 May 2019 the applicant also criticised the way he was examined by Dr Yajuvendra Bisht (Dr Bisht) at the appointment arranged by the insurer on 13 February 2019.

THE RESPONDENT’S CASE

22. The respondent’s case both in respect of the issue of injury and its s 11A defence is based on the findings and opinion of Dr Bisht in his report dated 13 March 2019³. Dr Bisht found that the applicant does not have a psychological disorder, notwithstanding the fact that (as acknowledged by the respondent in submissions) he gives three different descriptions of the applicant’s “psychological state” in that report. He described it firstly as a “normal emotional response rather than a psychiatric condition diagnosable under DSM IV”, then saying that the applicant does not have a “psychological disorder”, but that the main contributor to the applicant’s “psychological state” is the disciplinary action taken by the respondent on the day that the applicant stopped working.
23. The respondent then points to the evidence of Michael Carney, referred to in his statement dated 5 December 2018⁴ when the applicant was handed a letter as he was leaving work on 27 October 2018. The respondent submits that it was when the applicant received this letter and became aware of its contents that he first displayed a psychological response to events in the workplace.
24. The respondent also relies on the contents of an email dated 27 October 2018⁵, a more legible paper copy of which was admitted into evidence and marked Exhibit 1 in the respondent’s case. This email gives a timeline of events on 27 October 2018 when the applicant left work, but immediately before that was involved in what the author of the email, Daniel Milburn describes as a “shocking display of aggression and violence from Tim Ford in the staff canteen”. The respondent’s case is that this was triggered by the reasonable disciplinary action of Daniel Milburn in handing to the applicant a letter which requested his attendance on 31 October 2018 to discuss the hose incident when Robbie Mackay was hosed by the applicant.

³ Reply p 281.

⁴ Reply p 71.

⁵ Reply p 186.

25. The respondent submits that the opinion of Associate Professor Michael Robertson as to the applicant's diagnosis expressed in his report dated 4 June 2019⁶ should not be accepted without reservation, as the doctor had no history of the applicant's outburst in the canteen on the day he left work. The respondent also points to the suspicion expressed by Associate Professor Robertson that the adjustment disorder with anxiety and depressed mood diagnosed by him occurs against a background of underlying schizoid or avoidant personality traits.
26. Rather the respondent submits that the outburst of the applicant on 27 October 2018 supports the opinion expressed by Dr Bisht that it was the disciplinary action taken by the respondent on the day the applicant left work that was the main contributor to the applicant's psychological state.
27. The respondent also points to the expression of the treating psychiatrist, Hewa Atapattu, in his report completed 29 April 2019⁷ that "Possible impact of reported work related stress cannot be excluded and needs further exploration". There is no conclusion by this treating practitioner as to why the applicant was suffering from the symptoms complained of.
28. The respondent also points to the Summary and Assessment of Dr Azhar Naseeb Khan in his report dated 11 May 2019⁸ where the applicant is recorded as advising Dr Khan that he became particularly distressed after he received notification that he was subject to disciplinary action for an incident at work in the latter part of 2018, and was of the opinion that he was wrongly blamed for this incident. This history is said to be corroborative of the finding of Dr Bisht as to the causation of the applicant's psychological condition.
29. The respondent submits that the actions of Michael Carney, who joined the company in June 2018 and therefore did not have a history of any earlier problems suffered by the applicant and who was the respondent's Environmental Health and Safety officer, were reasonable in investigating the events leading up to the applicant's departure from work on 27 October 2018.

SUBMISSIONS

30. The submissions of the parties have been recorded⁹ and will not be repeated in full. In summary they are as follows.

Applicant

31. The applicant submits that there is no issue that the applicant suffered a psychological injury and that he therefore satisfied the requirement of s 11A(3) of the 1987 Act that he suffered an injury as defined in s 4 of that Act. He cites *Austin v Director-General of Education (Austin)*¹⁰ and *Bhatia v State Rail Authority of NSW (Bhatia)*¹¹ in support of this submission. Further there is no dispute that s 9A of the 1987 Act has been satisfied in that the applicant's employment with the respondent was a substantial contributing factor to injury.
32. The applicant refers to the evidence of Dr Sorani, general practitioner, who he first consulted on 29 October after he ceased work on 27 October 2018. Dr Sorani provided a report to the respondent's insurer, Allianz Australia Workers Compensation (NSW) Limited (Allianz) in response to a request dated 31 October 2018¹². In that report the doctor expressed the opinion that the applicant had a psychiatric disorder related to bullying at work, that the

⁶ Application p 45.

⁷ Application p 77.

⁸ Application p 64.

⁹ 15 August 2019 – T1; 4 September 2019 – T2.

¹⁰ (1994) 10 NSWCCR 373.

¹¹ [1997] NSWCC 25; 14 NSWCCR 568

¹² Application p 134.

psychological or psychiatric disorder was a disease of gradual process and that employment was the main contributing factor the contracting of the disease.

33. The applicant relies on the subsequent referral by Dr Sorani to Dr Hewa Atapattu, psychiatrist of the South West Clinic for treatment, and the diagnosis of that practitioner¹³. The applicant also relies upon the opinion of Dr Azhar Naseeb Khan, consultant occupational physician, who carried out an independent medical examination of him on 8 May 2019 and reported thereon on 11 May 2019¹⁴. Dr Khan found that the applicant's history was consistent with anxiety and depression as diagnosed by Dr Sorani, with whom he had discussed the matter.
34. These assessments, together with that of Associate Professor Robertson, who assessed the applicant on 3 June 2019 and reported thereon on 4 June 2019¹⁵, had to be contrasted with the opinion of Dr Bisht who concluded that the applicant was suffering from a normal emotional response rather than a psychiatric condition diagnosable under DSM5.
35. The applicant submits that the respondent has not discharged the onus on it to show the psychological injury suffered by him was wholly or predominantly caused by reasonable action taken or proposed to be taken with respect to discipline. Citing *State Transit Authority of NSW v Fritz-Chemler (Chemler)*¹⁶ he submits that there is no doubt that the various events described in his statement dated 15 November 2018 occurred, notwithstanding differences in the evidence provided by witnesses whose statements, attached to the Reply, are relied upon by the respondent. The applicant submits that nothing turns on these differences and there is no need to explore them in detail. The important factor is that they all occurred, and it was the applicant's reaction to them over the period of his employment which caused him to suffer psychological injury.
36. The applicant also questions as to whether the action of Daniel Milburn handing the letter to him on 27 October 2018 as he was about to leave work constitutes disciplinary action as contemplated by s 11A(1) of the 1987 Act. The applicant submits that this letter, the contents of which did not become known to him until after he left work, was simply an enquiry to establish what happened in the incident when Robbie Mackay was, inadvertently on the applicant's version of the event, hosed by him. Having said that, the applicant concedes that it would be hard to argue that the simple act of handing a letter to him was not reasonable.
37. The applicant submits that a close examination of Exhibit 1, the email dated 27 October 2018 referred to above at [24], when considered along with his own evidence supports the case that he did not become aware of the contents of the letter until after he left work on 27 October 2019. This strengthens his submission that it was the build up of events in the workplace over the period of his employment with the respondent, at least from 2010 onwards, that caused his psychological injury rather than any 'disciplinary' action taken by the respondent on 27 October 2018.
38. The applicant submits that, in accordance with the certification of Dr Sorani in the WorkCover certificates of capacity in evidence, he has had no current work capacity for any employment from the time he left his employment with the respondent until to date. The applicant submits that the question of total or partial incapacity for work is only put in issue in the notice issued by Allianz to the applicant dated 26 March 2019 under s 78 of the 1998 Act on the basis that any such incapacity is not the result of a work injury, that is an injury for which he entitled to receive compensation.

Respondent

¹³ Application p 79.

¹⁴ Application p 67.

¹⁵ Application p 45.

¹⁶ [200]7 NSWCA 249; 5 DDCR 286.

39. The respondent's principal submissions have been outlined at [22] – [29] above. The respondent also rejects the criticism of Dr Bisht by the applicant as to the way the independent medical examination was conducted by the doctor on 13 February 2019. The respondent concedes that the applicant is entitled to disagree with the findings and opinion of the doctor expressed in the report but says that it is inappropriate to attack the doctor as to the way he conducted his examination. What is important, according to the respondent, is the opinion of the doctor and whether there is support for that opinion found in the report.
40. Having said that, the respondent concedes that the three different descriptions of the applicant's psychological state or condition by Dr Bisht referred to in [22] above are "problematic"¹⁷. Nevertheless, the respondent submits that when this report is read along with several of the reports of the applicant's treating practitioners, there is support for the opinion of Dr Bisht.
41. The respondent submits that the "**HISTORY OF PRESENTING ILLNESS**" referred to on p 2 of Dr Bisht's report¹⁸ has been clearly sourced from what the applicant told the doctor and refutes the applicant's submission that there is no indication as to where this history came from. Further the "**MENTAL STATE EXAMINATION**" was more than superficial and such as to give comfort to the reader of the report that the opinion of the doctor can be accepted. In summary, Dr Bisht has taken a reasonable history from the applicant which provides a basis for his opinion that Mr Ford has suffered a normal emotional response to the events of 27 October 2018 and not suffered a diagnosable psychiatric condition. This is notwithstanding the fact that Dr Bisht does refer to the applicant suffering from a "psychiatric state" when he says in answer to question [3 c.] on p 6 of his report that he considers "the disciplinary action to have been the whole/predominant cause of the psychological state."¹⁹
42. If this opinion is accepted, the respondent submits that it has essentially made out its defence to the applicant's claim pursuant to s 11A of the 1987 Act.
43. The respondent relies on the contents of Exhibit 1 to demonstrate that it was the reaction of the applicant to the receipt of the letter from Daniel Milburn in the canteen on 27 October 2018 that caused the outburst described in the email and his psychological decompensation. This is notwithstanding the applicant's evidence that he did not become aware of the contents of the letter until he left the workplace on 27 October 2018. Daniel informed the applicant that the letter was a request for a meeting the following week, and the respondent submits that the applicant must have known the reason for the meeting.
44. The respondent emphasises that the canteen incident did not form part of the history given by the applicant to Associate Professor Robertson on 3 June 2019 and that therefore the opinion of the doctor as to the causation of the applicant's psychological injury must be questioned.
45. The respondent draws attention to what the applicant says at [17] of his statement dated 24 May 2019²⁰ in respect of a meeting he had with Michael Carney in June 2018 at The Oaks Hotel. The applicant says that it was around this time that he began to develop feelings of paranoia. This is consistent with Associate Professor Robertson's observation at p 6 of his report under "**ASSESSMENT**"²¹ that the adjustment disorder with anxiety and depressed mood diagnosed by him occurs against a background of some underlying schizoid or avoidance personality traits.

¹⁷ T2 p 3.15.

¹⁸ Reply p 282.

¹⁹ Reply p 286.

²⁰ Application p 17.

²¹ Application p 50.

46. The respondent submits that the applicant was clearly not prepared to cooperate with an enquiry into the incident on 25 October 2019 when Robbie Mackay was hosed by the applicant and that, once a complaint had been made in respect of this incident, it was obliged to investigate it. Whatever the course of events at the canteen on 27 October 2018, what happened on that day was the cause of the applicant's decompensation.
47. The respondent submits that the investigation of the event by Michael Carney was carried out in a proper manner and reasonable. It submits that what took place in the canteen on 27 October 2019 was a "real event", and that therefore the applicant's reliance of *Chemler* therefore does not assist him, because he decompensated in response to this event.
48. The respondent also submits that there is no evidence that the applicant's complaints in respect of workplace incidents prior to that of 27 October 2019 gave rise to any adverse psychological response at all.
49. In this regard the respondent notes that the applicant did not start consulting Velimir Kolundzic, psychologist, for treatment until 8 [sic, 7] November 2018²².

Applicant in response

50. The applicant notes that, in accordance with what he says at [17] – [18] and [21] of his statement dated 24 May 2019, he was experiencing depressive symptoms and feelings of anxiety from June 2018 onwards to September 2018, and that there had been a long history of conflict in the workplace. Dr Bisht, in giving his assessment of the applicant has not considered this long history of conflict.

FINDINGS AND REASONS

Injury

51. In *Bhatia* Judge Burke considered what was needed in order to recover compensation for psychiatric injury, He said at 578:

"Emotion is a fact of day-to-day life. If your daughter is ill, you can tend to be anxious; if she dies, you can tend to be depressed. Neither reaction is a physiological abnormality both being emotional reactions, or impulses, appropriate to the stimulus. This type of emotional impulse is the normal reaction of a human person or organism to a particular event. If that reaction becomes excessive in degree or duration, or is inappropriate to the stimulus, then there can be a physiological problem."

52. In *Austin Powell* JA expressed the view that symptoms of anxiety, mania and depression experienced by the worker in that case were physiological effects manifesting the effects of injury. These two decisions were referred to with approval by Roche DP in *Department of Corrective Services v Bowditch*²³ at [54] with the observation that, if it be accepted that a worker has symptoms of the type and degree referred to by Powell JA in *Austin*, then it is axiomatic that he has suffered an injury.
53. Following his departure from work on 27 October 2018 the applicant consulted Dr Sorani on 29 October 2018. The applicant says at [71] in his statement dated 15 November 2018 that he was issued with a WorkCover certificate of capacity "on account of depression and anxiety" and deemed unfit to work until 15 November 2018. He was referred to Velimir (Kolundzic) for counselling, and to Dr Hewa Atapattu, a psychiatrist at South West Private Hospital. The clinical note of the attendance on Dr Sorani is as follows²⁴:

²² Application p 84.

²³ [2007] NSWCCPD 244.

²⁴ Application p 99.

“has had work related bullying at work about 4 months ago,has tried mediations, not working,stated that he has had the same condition with depression due to bullying about 10 years ago
said to him to not go on work cover and they solve the problem-but not solved,having stress,anxiety,unable to sleep-has
been not taking medications, not seen a psychologist or psychiatrist
seeing his work today to fillout w/c form then coming back tomorrow” [sic]

54. The referral to Dr Atapattu was made on 30 October 2018²⁵. Dr Atapattu’s notes are referred to above at [33]. That doctor took a history of the applicant’s work with the respondent over 26 years and noted claims of ongoing problems with the team leader from about 2014. He made the diagnosis of:

“Imp- ? mixed anxiety and depressive symptoms (mild to moderate)
Possible impact of reported work related stress cannot be excluded and needs further exploration.”

55. The applicant started consulting Velimir Kolundzic on 7 November 2018. The records of consultations with that practitioner until 10 April 2019 are in evidence. The case note of the consultation with Mr Kolundzic on 7 November 2018 is referred to above at [49]. He recorded DASS 21 scores of: “Depression (21) Extremely Severe, Anxiety (17) Extremely Severe, Stress (17) Extremely Severe.” The applicant provided the psychologist with a brief account of bullying at the workplace which started in 2010/11 when he was off work for five months. He reported symptoms of sadness, low mood and crying uncontrollably, lack of motivation and interest, problem with memory, stiff muscles and joints, lack of interest regarding personal hygiene, lack of concentration, everything being a struggle due to fatigue and racing heart. These symptoms continued and in part are again recorded in the consultation note of 9 January 2019²⁶.
56. On 31 October 2018 Dr Sorani provided the report to Allianz referred to above at [32]. He expressed the opinion that the applicant had a psychiatric disorder related to bullying at work.
57. The applicant gives evidence of increasing anxiety and feelings of paranoia from June 2018 following the meeting at The Oaks Hotel with Michael Carney when he discussed the bullying he faced from his colleagues.
58. On 11 May 2019 Dr Khan found that the applicant was unfit for work pending further psychological treatment, after recording a history of recurrent bullying at work, initially in 2010/2011. He diagnosed anxiety and depression.
59. On 3 June 2019 Associate Professor Robertson found that the applicant presented with adjustment disorder with anxiety and depressed mood, which he suspected occurred against the background of some underlying schizoid avoidant personality traits.
60. In *Attorney General’s Department v K (AG v K)*²⁷ Roche DP noted at [52] that employers take their employees as they find them. There is an “eggshell psyche” principle which is the equivalent of the “eggshell skull” principle, citing Spigelman CJ in *Chemler*.
61. In contrast to the opinions of Dr Sorani, Dr Khan and Associate Professor Robertson is that of Dr Bisht, with the three different descriptions of the applicant’s psychological state or condition referred to above at [22]. Dr Bisht said that:

²⁵ Application p 105.

²⁶ Application p 83.

²⁷ [2007] NSWCCPD 76.

- (a) the applicant was suffering from a normal emotional response rather than a psychiatric condition under DSM5;
 - (b) the main contributor to the psychological state of the applicant was the disciplinary action taken by the respondent on the day that he stopped working, acknowledging that Mr Ford was facing stressors at work even prior to that, but the severity of the symptoms increased on that day which prompted him to stop working;
 - (c) there were no non-work factors that contributed to the initial development of the psychological or psychiatric disorder;
 - (d) the applicant could return to preinjury capacity but needed to avoid shifts that overlapped with the team leader he felt bullied by as it was likely to worsen his psychological condition, and
 - (e) the restrictions and treatment recommended are to prevent worsening of the applicant's psychological state.
62. Of note also is what the applicant says at [27] in his statement dated 24 May 2019. He criticizes Dr Bisht's manner as being aggressive and condescending and says that he felt as though he was being accused of lying or being a criminal. He then says that at one point Dr Bisht said, "*I can see that you're sick, but what am I going to tell the insurance company?*" Whilst I accept the respondent's submission that it is inappropriate for the applicant to criticize the way Dr Bisht conducted his examination, no evidence has been lodged to refute this statement of the applicant. I accept that evidence.
63. In my view that applicant has discharged the onus on him to show that he sustained psychological injury arising out of or in the course of his employment, and that such employment was a substantial contributing factor to such injury. The symptoms of anxiety and depression diagnosed by the doctors and psychologist who treated the applicant after 27 October 2018, and who also independently assessed him, were physiological effects manifesting the effects of injury. Further, I accept the opinion of Associate Professor Robertson notwithstanding the fact that he did not receive a history of the applicant's outburst in the canteen on 27 October 2018. It is in line with all the other diagnoses of the applicant's condition apart from that of Dr Bisht. When one analyses that doctor's opinion, I think that he too found that Mr Ford was suffering from a psychological injury.

Section 11A defence

64. Exhibit 1 includes an email from Daniel Milburn to Catherine Olima and others addresses "Hi Team" and referring to "a shocking display of aggression and violence from Tim Ford in the staff canteen,..." The timeline set out therein is as follows:
- (a) 3.19 am – the applicant intercepts Daniel Milburn as he is walking down the staircase neat the B2 spiral conveyor and informs Daniel he is sick. When asked "what type of sick are you?" the applicant replies, "I'm just sick, I'm not a doctor". The applicant demurs to further enquiry from Daniel as to his sickness and requests a witness to further discussion;
 - (b) 3.21 am - when approached by the applicant and Daniel, "Ben K" confirms that it is in order for Daniel to enquire as to the type of sickness that the applicant claims he is suffering. This appears not to please the applicant;
 - (c) 3.24 am – Daniel Milburn remembers that he needs to give the applicant "the meeting request for next week before ho goes home", and rushes to the office.

Daniel asks Olyssa, who is in the office, to be in the vicinity while he gives the applicant the meeting request. When Daniel sees the applicant in the canteen, he asks Olyssa to “hang out in the canteen.” Daniel tries to hand the letter to the applicant saying, “hi Tim, I need to give you this meeting request for next week, if you have any questions Ron said to call him.” The applicant does not take the letter but says, “I’m sick, you can give me the letter next week” and starts walking away. Daniel replies “I need to give it to you today Tim, because it is for next week.”;

- (d) the applicant then walks out of the canteen briefly, then comes back and starts kicking chairs and tables in the canteen. The applicant says something along the lines to Olyssa “she never leaves me alone, I’m always under the spotlight” and he continues picking up chairs and bashing the furniture, and starts screaming at Daniel “call security” to which Daniel replies “what do I need security for Tim?”
- (e) the applicant’s conduct continues for another 30 seconds to a minute. Daniel restates that he still needs to give the applicant the meeting request. The applicant then accepts and storms out of the canteen.
- (f) 3.35 am - the applicant is observed by Daniel and Olyssa leaving the premises.

65. When one considers what the applicant says as to the events of 27 October 2018 as he was leaving work (referred to above at [12] and [20]), it is clear that he did not discover the contents of the letter handed to him by Daniel Milburn until he was in the carpark of the respondent’s premises. Mr Ford says at [70] of his statement dated 15 November 2018 that the letter handed to him by Daniel to attend the meeting was to discuss conduct concerns. Michael Carney says at [36] of his statement dated 5 December 2018²⁸ that the letter to attend the meeting was “to ascertain the circumstances of what occurred”, referring to the hosing incident. While Mr Carney denies saying to the applicant during the course of the telephone call that the applicant made to him when he got home on 27 October 2018 that “they’re setting you up”, he does concede he said, “leave it with me”.
66. The respondent points to Mr Carney’s evidence that the applicant would not cooperate with management to explain his side of the story about what happened in the hosing incident, and that therefore the respondent was obliged to investigate it. This was in the context of Mr Carney attempting to deal with discontentment in the workplace since his arrival there in June 2018. The respondent submits that the applicant may have been aware as to why he was being handed a letter requesting a meeting²⁹.
67. The applicant may have guessed the reason for the meeting request when he was handed the letter; however he had not read it and was not aware of its contents before his outburst in the canteen. He said that he reached breaking point and stormed into the cafeteria, and this was as a result of years of bullying.
68. The applicant submits that in any event, he had left work early on 27 October 2018 because he was sick, and conveyed this to Daniel Milburn, his supervisor, before there was any mention of a letter.
69. There are signed statements in evidence, attached to the Reply, from Michael Carney dated 5 December 2018, Ros Cluning dated 5 December 2018³⁰, Roneel Naigel Mudllar dated 5 December 2018³¹, Patrick Vella dated 5 December 2018³² and Chandralingam Nadaralah

²⁸ Reply p 75.

²⁹ T2 – p 19.15.

³⁰ Reply p 78.

³¹ Reply p 83.

³² Reply p 92.

dated 12 December 2018³³. There is also in evidence an Investigation Report of Quantumcorp dated 18 December 2018³⁴. On pp 8-9 of that report there is a table outlining the claimant's allegations and evidence from witnesses either corroborating or refuting the applicant's allegations. Some allegations are either corroborated or partly corroborated and a number are refuted.

70. In *AG v K Acting President Roche* noted the following (omitting reference to the authorities reviewed by him):
- (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;
 - (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;
 - (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;
 - (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;
 - (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”, 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.
71. In *Baker v Southern Metropolitan Cemeteries Trust*³⁵ the Commission noted at [114] that in a case where it is alleged that the hostile work environment resulted from numerous events over a long period the claim does not fail because one or two of the events may not have occurred or occurred precisely as alleged. In such a case the arbitrator must consider the evidence and determine whether the worker perceived that a hostile work environment existed.
72. In this case the evidence establishes that several real events actually occurred which created a perception in the applicant that he was in a hostile work environment. This hostility in the workplace went back to 2010 when the applicant was off work for around four months before returning to pre-injury duties on a return to work plan. In 2014 the applicant alleges he was threatened by his team leader Jeff Joseph (applicant's Allegation 1). In Allegation 2 the applicant complained to the former nightshift manager Paul Field of favouritism being shown by Jeff Joseph to certain co-workers. Both of these Allegations are corroborated wholly or in part. Another example of the applicant perceiving a hostile working environment occurred in June 2018 when the applicant attended a meeting with Ros Clooney and Ranil, the night shift manager, over an incident in March 2018 when the applicant was accused of harassing and bullying co-worker Angel Calang-AD (Allegation 5). Pat Vella attended that meeting with the applicant as a support person.
73. The applicant's perception of a hostile working environment is corroborated to an extent by what he told his general practitioner, Dr Sorani, when he consulted him on 29 October 2018.

³³ Reply p 105.

³⁴ Reply p 12.

³⁵ [2015] NSWCCPD 56.

The text of the clinical note created on that day is set out at [53] above. On the following day the applicant again consulted Dr Sorani when he recorded:

“still same anxiety,depression,irritations,no thoughts of self harm
considering of 4 month history-referral to see a psychiatrist for assessment” [sic]

74. The clinical note of Velimir Kolundzic dated 8 November 2018 following the applicant’s first session with this practitioner on 7 November 2018 (referred to above at [55]) also records a brief account of bullying at the workplace starting in 2010/2011.
75. In my view that applicant’s outburst on 27 October 2018 was the culmination of a series of events in the workplace which caused the applicant to perceive he was in a hostile work environment. The applicant submits that the escalation of events on 27 October 2019 was part of a continual reflection on his condition at that time. I accept this submission. That was the cause of his psychological injury diagnosed initially by Dr Sofrani and Mr Kolundzic who saw the applicant shortly after he left work, and later by Dr Atapattu, psychiatrist, to whom the applicant was referred for treatment.
76. I do not think that the applicant’s psychological injury was as a result of what occurred on 27 October 2018 when Daniel Milburn handed the applicant a letter requesting his attendance at a meeting the following week.
77. The applicant’s injury was not wholly or predominantly caused by action taken or proposed to be taken by the respondent on 27 October 2018 with respect to discipline.
78. The applicant is therefore entitled to an award in his favour for the weekly benefits and s 60 expenses claimed by him.
79. The applicant submits that the action of the respondent on 27 October was not action with respect to discipline, but rather an enquiry as to what happened. At that stage there was no suggestion of anyone being disciplined. The applicant does however concede that the handing of a letter to the applicant by Daniel Milburn could not be said to be unreasonable. In view of my finding in respect of injury, it is unnecessary to make a finding as to whether the respondent’s action was with respect to discipline. However if I am wrong in respect of my finding on injury, my view is that the act of handing the letter to the applicant on 27 October 2018 was not action with respect to discipline.
80. Neilson J in *Kushwaha v Queanbeyan City Council*³⁶ held at 362 that the word “discipline” should be given its full meaning, and that the primary meaning of the word:
- “is learning or instruction imparted to the learner and the maintenance of that learning by training, by exercise or repetition. The narrow meaning of punishment or chastisement is secondary to the primary meaning although the word is often used in this sense in popular speech.”
81. In *Sinclair v Department of Education and Training*³⁷ Spigelman CJ said in respect of “actions” with respect to discipline:
- “Such actions usually involve a series of steps which cumulatively can have psychological effects. More often than not it will not be possible to isolate the effect of a single step. In such a context the ‘whole or predominant cause’ is the entirety of the conduct with respect to, relevantly, discipline.”

³⁶ (2002) 23 NSWCCR 339; [2002] NSWCC 25.

³⁷ (2005) 4 DDCR 206; [2005] NSWCA 465.

82. In *Northern NSW Local Health Network v Heggie (Heggie)*³⁸ Sackville AJA stated that 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.
83. In my view, and notwithstanding the observation of Sackville AJA in *Heggie*, the action of the respondent in requiring the applicant to attend for a meeting to ascertain what went on in the incident when the applicant hosed Ribbie Mackay was a preliminary enquiry only, particularly when viewed in the context of Mr Carney attempting to deal with discontentment in the workplace since his arrival there in June 2018. It was not action with respect to discipline.

Incapacity

84. The respondent only put incapacity for work in the context of denying liability for the applicant’s claim on the basis that he did not suffer a compensable injury. Dr Bisht said that the applicant could return to work in his pre-injury capacity but needed to avoid working shifts that overlap with the team leader by whom he felt bullied. That opinion must be read along with the opinion of the doctor that the applicant suffered a normal response only rather than a psychiatric condition diagnosable under DSM 5 as a result of what occurred on 27 October 2018.
85. The latest WorkCover certificate of capacity in evidence from Dr Sorani contains certification of no current work capacity for any employment until 7 December 2018³⁹. Dr Khan found on 8 May 2019 that the applicant was currently unfit for work⁴⁰. Associate Professor Robertson found on 3 June 2019 that the applicant had incapacity for employment with the respondent since the day he ceased employment in October 2018. He said that there was potential work capacity in the future but that the applicant was currently unfit for employment.
86. The applicant left school at year 8 and thereafter worked as a store person in a clothing factory for two years, and for seven years with Carlton United Breweries as a machine technician before joining the respondent (then known as Schweppes) in a similar role. He remained there until he ceased work on 27 October 2018.
87. With this background of employment and having regard to the applicant’s injury and the opinions of Drs Sorani and Khan, and Associate Professor Robertson, I do not think that the applicant is able to return to work, either in his pre-injury employment or suitable employment as defined in s 32A of the 1987 Act.
88. It was agreed between the parties that any award for weekly benefits in favour of the applicant would be pursuant to s 37 of the 1987 Act, the applicant having been paid until 22 April 2019⁴¹. Pre-injury average weekly earnings are agreed at \$2,757.19⁴². The applicant is therefore entitled to an award from 23 April 2019 to date and continuing of 80% of this sum pursuant to s 37(1), that is \$2,205.75.
89. The applicant is also entitled to an award for medical and related treatment pursuant to s 60 of the 1987 Act.

SUMMARY

90. The applicant sustained injury on 27 October 2018 arising out of or in the course of his employment with the respondent.

³⁸ (2013) 12 DDCR 95; [2013] NSWCA 255.

³⁹ Application p 75.

⁴⁰ Application pp 65-66.

⁴¹ s 78 notice – Reply p 9.

⁴² T1 – p 12.

91. The applicant's employment with the respondent was a substantial contributing factor to such injury.
92. The applicant's injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to discipline.
93. The applicant has had no current work capacity since 23 April 2019.
94. The respondent is to pay the applicant \$2,205.75 per week from 23 April 2019 to date and continuing pursuant to s 37(1) of the 1987 Act.
95. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the 1987 Act.

