WORKERS COMPENSATION COMMISSION

Amended CERTIFICATE OF DETERMINATION

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

Matter Number: **5149/19**
Applicant: **HERNAN RATTO**
Respondent: **TRANSPORT ROADS AND MARITIME**
Date of Determination: **13 December 2019**
Date of Amendment: **19 December 2019**
Citation: **[2019] NSWWCC 414**

The Commission determines:

1. The name of the respondent is amended as shown above.

2. The Application to Resolve a Dispute is amended to include a claim for section 60 of the *Workers Compensation Act 1987* expenses.

3. The respondent's defence under section 11A(1) of the *Workers Compensation Act 1987* is not made out.

4. The respondent is to pay to the applicant weekly compensation as follows:

   (a) from 1 July 2019 to 30 September 2019 at the rate of $2,177.40 (ss 36 and 34 *Workers Compensation Act 1987*), and

   (b) from 1 October 2019 to date at the rate of $2,195.70 (ss 37 and 34 *Workers Compensation Act 1987*).

5. Such payments to continue in accordance with the Act.

6. That the respondent pay the applicant's section 60 of the *Workers Compensation Act 1987* expenses on production of accounts/receipts.

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

Ross Bell
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 ROSS BELL, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar

AMENDED STATEMENT OF REASONS

These reasons were amended under the Slip Rule on 19 December 2019

ACKGROUND

1. This Application to Resolve a Dispute was filed on 2 October 2019 and is in respect of a claim for injury on 13 March 2019 for weekly compensation and s 60 of the *Workers Compensation Act 1987* (1987 Act) expenses. The insurer denied the claim in a notice issues under s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) dated 6 June 2019.

ISSUES FOR DETERMINATION

2. The following issues remain in dispute:

   (a) Is the defence of Transport Road and Maritime (the respondent) under s 11A(1) of the 1987 Act made out?

   (b) If not, is Mr Ratto (the applicant) partially or totally incapacitated and, if so, what is his entitlement to weekly compensation?

   (c) Is the applicant entitled to s 60 of the 1987 Act expenses?

PROCEDURE BEFORE THE COMMISSION

3. The parties attended a conciliation conference and arbitration hearing on 14 November 2019. 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.

EVIDENCE

Oral evidence

4. There was no oral evidence adduced.

Interlocutory Issue – Admissibility of annexures to the respondent's factual reports

5. At the arbitration hearing I determined that the documents objected to by the applicant could not be admitted in evidence in the proceedings and gave short oral reasons for that decision. Those reasons were recorded. Further reasons are provided below.

6. The applicant objected to documents annexed to the Reply that were not provided by the insurer with the Notice issued under s 78 of the 1998 Act. The applicant contends that the documents must be excluded in accordance with s 73 of the 1998 Act and Clause 41 of the Workers Compensation Regulation 2016 (Regulation).

7. These documents comprise the annexures to the Procare "First Factual Report" dated 16 April 2019; and Procare "Second Factual Report" dated 20 May 2019. The subject objected to are pp 3-71 and pp 92-588 of the annexures to the Reply. The applicant submits that these documents were not provided with the Notice issued to Mr Ratto under s 78 of the 1998 Act. Mr Ratto states that only the summary reports were included, together with the report of Dr Vickery dated 6 May 2019.

Evidence relevant to interlocutory issue

(a) Notice issued under s 78 of the 1998 Act dated 6 June 2019;
(b) statement of Mr Ratto 18 September 2019, and
(c) documents annexed to the Reply;

Discussion on interlocutory issue

8. The obligations on an insurer who disputes liability are set out in s 73 of the 1998 Act and regulation 41 of the Regulation. Section 73 of the 1998 Act provides:

> "73 INSURER TO PROVIDE COPIES OF REPORTS TO WORKER
>
> (1) The regulations may make provision for or with respect to requiring an insurer to provide a worker, a worker's legal representative or any other person with a copy of a specified report, or a report of a specified kind, obtained by the insurer in relation to a claim by the worker.
>
> (2) Without limiting subsection (1), the kind of reports to which the regulations under this section can apply include investigators' reports, rehabilitation providers' reports and reports of assessments under section 40A (Assessment of incapacitated worker's ability to earn) of the 1987 Act.
>
> (3) If an insurer fails to provide a copy of a report as required by the regulations under this section:
>
> (a) the insurer cannot use the report to dispute liability to pay or continue to pay compensation or to reduce the amount of compensation to be paid and cannot use the report for any other purpose prescribed by the regulations for the purposes of this section, and
>
> (b) the report is not admissible in proceedings on such a dispute before the Commission, and
>
> (c) the report may not be disclosed to an approved medical specialist or an Appeal Panel in connection with the assessment of a medical dispute under Part 7 of Chapter 7.

9. Reg 41 of the Regulation provides:

> "41 ACCESS TO CERTAIN MEDICAL REPORTS AND OTHER REPORTS OBTAINED BY INSURER
>
> (1) This clause applies to the following types of reports that an employer or insurer has in the employer's or insurer's possession--
>
> (a) medical reports, including medical reports provided pursuant to section 119 (Medical examination of workers at direction of employer) of the 1998 Act,
>
> (b) certificates of capacity,
>
> (c) clinical notes,
>
> (d) investigators' reports,
>
> (e) workplace rehabilitation providers' reports,

(f) health service providers' reports,

(g) reports obtained by or provided to an employer or insurer that contain information relevant to the claim on which a decision to dispute liability is made.

(2) This clause applies to the following decisions of an employer or insurer relating to an injured worker--

(a) a decision to dispute liability in respect of a claim, or any aspect of a claim (in circumstances requiring the insurer to give the worker a notice under Division 3 of Part 2 of Chapter 4 of the 1998 Act),

(b) a decision to discontinue payment, or to reduce the amount of weekly benefits (in circumstances requiring the insurer to give the worker a notice under Division 3 of Part 2 of Chapter 4 of the 1998 Act),

(c) a decision on the review under section 287A of the 1998 Act of a decision described in paragraph (a) or (b) that confirms the original decision.

(3) For the purposes of sections 73(1) and 126(2) of the 1998 Act, if an employer or insurer makes a decision to which this clause applies, the employer or insurer must provide a copy of any relevant report to which this clause applies to the worker, as an attachment to a notice under Division 3 of Part 2 of Chapter 4 of the 1998 Act or section 287A of the 1998 Act, as the case may be, except where the report has already been supplied to the worker and that report is identified in a statement under clause 38(1)(d).

(4) The obligation in this clause to provide a copy of a report applies to any report that is relevant to the claim or any aspect of the claim to which the decision relates, whether or not the report supports the reasons for the decision.

(5) If the employer or insurer is of the opinion that supplying a worker with a copy of a report would pose a serious threat to the life or health of the worker or any other person, the employer or insurer may instead supply the report--

(a) in the case of a medical report, certificate of capacity or clinical notes--to a medical practitioner nominated by the worker for that purpose, or

(b) in any other case--to a law practice representing the worker.

(6) If, on the application of an employer or insurer, the Authority is satisfied that supplying the worker with a copy of the report would pose a serious threat to the life or health of the worker or any other person and that supplying the report as provided by this clause would not be appropriate, the Authority may—

(a) direct that the report be supplied to such other persons as the Authority considers appropriate, or

(b) make such other directions as the Authority thinks fit.”

10. Section 73 of the 1998 Act provides for the making of regulations regarding the provision of various reports and other documents by an insurer to a worker. Regulation 41 was drafted for this purpose and it provides that it is mandatory for an insurer to provide copies of such documents identified in the Regulation to a worker, particularly those relied upon in support of a decision to dispute liability in a s 78 Notice.

11. It is apparent from the above provisions that the failure to provide copies of the reports and documents to a worker makes them inadmissible in any proceedings. In addition, the respondent cannot rely on these materials to decline liability to pay weekly compensation or to reduce payments. This has been found to be the case in a number of Presidential decisions, including *Inghams Enterprises Pty Ltd v Thoroughgood* [2013] NSWWCCPD 29 and *Chown v Tony Madden Refrigeration Transport Limited* [2005] NSWWCCPD 159 (*Chown*), relied on for Mr Ratto.

12. In his statement of 18 September 2019 Mr Ratto says that the only documents provided by the insurer with the Notice issued to him under s 78 of the 1998 Act were the two summary investigation reports of Procare and the report of Dr Vickery. He says the annexures to the two investigation reports relied on by the insurer were not provided to him.

13. There is nothing to contradict Mr Ratto's evidence as to what was provided by the insurer with the s 78 Notice, such as evidence from the officers of the insurer involved in the issuing of the Notice.

14. The respondent did not submit that the subject documents were provided to Mr Ratto, but contends that the annexures to the Procare reports are not part of those reports, but are documents that have their own standing and are therefore not covered by the exclusionary provisions. I do not accept this submission. The annexures are integral to the summary reports before the insurer at the time the claim was denied. The summary reports are based on the annexures, much of which was produced in the course of the investigation. They are clearly documents covered by Clause 41.

15. As noted in *Chown* there is no discretion for the Commission to allow the documents into the proceedings as the requirement to provide such documents is mandatory (s 73(3)(b)). The documents must be excluded.

16. For these reasons the documents at pages 3-71 and 92-588 of the annexures to the Reply are excluded from the evidence.

Issue – Was the psychological injury suffered by Mr Ratto wholly or predominantly caused by the reasonable actions of the employer with respect to discipline or performance appraisal? (s 11A(1) 1987 Act)

Documentary evidence relevant to the issue of s 11A(1) of the 1987 Act

17. Given the outcome of the interlocutory matter above, the following documents are in evidence before the Commission for the substantive issue in dispute and I have taken them into account in making this determination:

    (a) Application to Resolve a Dispute and annexed documents;

    (b) Reply and annexed documents as follows:

        (i) Procare "First Factual Report" at pages 1-2 of the annexures to the reply;
        (ii) Procare "Second Factual Report at pages 72-91 of the annexures to the Reply;
        (iii) Report of Dr Vickery 6 May 2019 (Reply annexures pp 589-597).

Applicant

Mr Ratto's statements

18. In his statements Mr Ratto outlines a detailed history of events he found stressful in the workplace. He says that the problems were ongoing for some 2.25 to 2.5 years before he went off work. He outlines behaviours in the workplace of Mr Mathison and Mr McDermott over that period that made him feel "useless" and undermined. He reports a series of meetings with his supervisor Mr Mathison without any agenda or opportunity for a support person at which issues of his performance were raised in general terms. These meeting were on 10 August 2018; 5 November 2018; and 30 November 2018. Mr Ratto was concerned that the processes of the respondent were not followed, such as a start date, or a clear timetable for monitoring and feedback. Mr Ratto was also concerned that the process went on for well over 12 weeks.

19. Mr Ratto took a month off after the 30 November meeting with Mr Mathison due to what he describes as "mental stress of trying to work with Alan".

20. On 23 January 2019 a further meeting was held involving the HR section and a union representative at which Mr Ratto was placed under formal performance management.

21. Mr Ratto descibes what he calls "a toxic work environment" due to Mr Mathison and one of Mr Ratto's staff, Mr McDermott who he says was empowered by Mr Mathison to "terrorise" people in the workplace.

22. He complains that work was assigned directly by Mr Mathison to staff under Mr Ratto's supervision without refence to him making him feel sidelined.

23. Mr Ratto describes a situation in which he drafted a letter about a compliance issue to 104 NSW councils which was approved by Mr Mathison but when there were complaints about the letter he disowned it, making Mr Ratto feel "betrayed".

24. The behaviour of Mr McDermott towards Mr Ratto is described by Mr Ratto as including "bullying and racism" which he has reported to Mr Mathison to no avail. Mr Ratto says Mr Mathison gave instructions directly to Mr McDermott rather than going through him and Mr McDermott and Mr Mathison had a direct relationship that undermined Mr Ratto.

25. Mr Ratto oulines several professional issues in which there was disagreement expressed by Mr Mathison and Mr McDermott to Mr Ratto in areas of his professional expertise. He says he felt intimidated and "backed off to not face it again", feeling "less important and undervalued". Mr Ratto says he felt "unhappiness at work and lack of confidence in my work".

26. Mr Ratto says he was yelled at by Mr McDermott when he did not like direction given to him; that he would "stare me down, point at me, say not very nice words". He says Mr McDermott told him in front of a staff meeting to "grow some balls" when he disagreed with a decision Mr Ratto had made, and that he was "anal retentive". He says Mr McDermott has left "irate" messages on his voicemail. He says "Colleagues have told me that it is disgraceful how Terry speaks to me." Mr Ratto says this behaviour had been going on "for two years or so". He says he had many private documented discussions with McDermott about unprofesisonal and aggressive behaviour towards himself and other staff. He says he moved desks to protect another of his staff being bullied by Mr McDermott.

27. Mr Ratto states that Mr Mathison has been dealing directly with staff under his supervision for many years. He states that he "felt undermined and useless" and described the effect on his sleep and the ruminations about Mr Mathison and Mr McDermott.

28. Mr Ratto states that Mr Mathison was giving him work with time frames that could not be met without support or extra resources. He says Mr Mathison threatened to end his "teleworking" arrangement if he did not do as he was told. He says he did this in front of his whole team.

29. Mr Ratto also outlines the pressures he felt being directed by Mr Mathison to provide advice on work outside his areas of expertise, and how, in discusison about it, Mr Mathison said he should look for another job.

30. Mr Ratto says he began to talk to his general practitioner (GP) Dr Naumovski in 2017 "about the effect of Alan's management of me and Terry's meltdowns with myself and staff on my health". He says he did take some time off in 2018 but did not claim workers compensation until February or March 2019. He states he was referred to Psychologist Trisha Stevens in late 2018 "due to Alan's and Terry's bullying with myself and staff".

31. Mr Ratto says he cannot return to the "toxic work environment" that has seen some five people leave after complaining for months about it.

Email to management from Mr S Becke

32. Mr Becke outlines to senior management his concerns about the "toxic" working environment in his section of Compliance Management managed by Mr Mathison, including specific issues he had with Mr Mathison. Mr Becke says that because of the problems with Mr Mathison, including poor management, leadership, and a "toxic culture", his health was affected, and he looked out for and obtained other employment. He says that he is aware of several other staff who have consulted doctors or "EAP" for stress and anxiety or have resigned due to the issues in the work unit.

Statement of Mr C Inglis

33. Mr Inglis outlines issues of "bullying" by his own direct supervisor and gives a detailed account of incidents with Mr Mathison, until he was unable to continue at work due to a developing psychological reaction.

Mr Ratto's spouse – emails to State Minister 8 February and 10 March 2019

34. These emails express concern about events at Mr Ratto's workplace which reflect many of the matters raised by Mr Ratto. They also note his spouse's observations as to Mr Ratto's reaction to the events.

Mr Ratto's response to the outcome of his complaint to the respondent of 2 August 2019

35. Mr Ratto says that his complaint was not substantially about bullying, but was was largely about his authority being undermined by Mr Mathison and empowering Mr McDermott to act as he pleased.

Dr Naumovski report 13 August 2019

36. Dr Naumovski reports that Mr Ratto started reporting problems at work in February 2018 in regard to issues with his line manager,and that several such work problems were discussed between February and December 2018.

37. Dr Naumovski lists some of the issues discussed which are consistent with Mr Ratto's statements, and he reports that by December 2018 Mr Ratto was becoming unable to cope with work. He outlines the change in presentation and the symptoms he observed due to the work problems compared with the period prior to 2018. He says Mr Ratto is totally incapacitiated and that he will improve with support and "healthy work circumstances".

Trish Stevens psychologist 16 July 2019

38. Ms Stevens notes that Mr Ratto was referred by Dr Naumovski on 21 December 2018, and that she first saw him on 8 January 2019 when he registered severe depression, with moderate anxiety and stress in testing.

39. Ms Stevens takes the history of elements of the work causing stress for Mr Ratto, including a heavy workload due to restructuring, unrealistic timeframes for completion set by Mr Mathison, the performance program which Mr Ratto saw as unfair as some of the additional work being outside his teams area of responsibility and expertise.

40. Ms Stevens also notes the problems with the "work from home" arrangement with Mr Mathison. She notes also his distress at the direct contact between Mr Mathison and Mr McDermott he saw as underminning his authority. She records that Mr Ratto requested a transfer away from these two individuals but that this was refused. She reports that there was a long period of time over which Mr Ratto was experiencing stressful interaction but was attempting to resolve the situation at work without success. She summarises the cause of his Depressive Disorder,

> "He had been working tn the organisation for many years without any prior difficulties with his work. The increased workload from the organisational restructuring, the closing of departments and the transfer of additional work outside his area of experience to Hernan' s department contributed to his stress. Poor management by his manager Alan resulted in Hernan being continually undermined by his subordinate, Terry, with Alan making iittle attempt to discipline Terry to resolve the situatfon. The HR department who were aware of Terry undermining Hernan, also failed to show leadeushfp and instruct Alan to rectify the matter."

41. Ms Stevens was of the opinion that Mr Ratto was suffering from depression and anxiety which would make it difficult for him to reurn to work, but after improvement he could attempt a return to work if the situation was resolved, preferably in another position.

Dr Selwyn Smith report 12 July 2019

42. Dr Smith takes a history consistent with Mr Ratto's statements and says, "I viewed his psychiatric condition as a result of the significant occupational conflict he had been exposed to, particularly by Mr Alan Mathison and Mr Terry McDermott."

43. Dr Smith diagnosed "Adjustment Disorder with mixed Depressed and Anxious Mood", and opines, "I have found Mr Ratto to be a credible individual who has been exposed to a significant occupational conflict that has clearly taken its toll."

44. Dr Smith disagrees with Dr Vickery as to Mr Ratto's capacity for work. He is of the view that,

> "In my opinion Mr Ratto is in need of further ongoing psychiatric and psychological treatment along current lines. I do anticipate that he will improve sufficiently and then would be able to reengage at work on a graduated return to work basis. Given his significant psychiatric symptoms he has not as yet reached that stage."

45. He says in summary, "Currently Mr Ratto has no capacity for employment."

Medical Certificates

46. The medical certificates cover the period claimed up to the certificate dated 9 September 2019, which certifies Mr Ratto totally unfit for at least two months.

Respondent

Procare summary reports

47. These are the reports of the investigator based on interviews and other documents obtained for the investigation. There is no direct evidence in these reports and they are of little probative value.

Dr Vickery report 6 May 2019

48. Dr Vickery takes a history which commences later in 2018 after the commencement of performance management. He concludes that, "Mr Ratto's employment is a substantial and the main contributing factor to the diagnosable psychological condition on the basis of the information provided."

49. Dr Vickery diagnoses "Adjustment Disorder in partial remission". He sees Mr Ratto as being capable of return to work anywhere other than the section he was working in.

50. Asked about the relevance of the categories in s 11A(1) of the 1987 Act of performance appraisal and discipline, Dr Vickery says,

> "The psychological condition is predominately related to Mr Ratto's reaction to the perceived inappropriate process and procedures of actions taken by the employer which can be considered as 'performance appraisal' or discipline."

Discussion

51. In *Chisholm v Thakral Finance Pty Ltd trading as Novotel Brighton Beach* [2011] NSWWCCPD 39 (*Chisholm*) Roche DP set out a useful guide to the legislation and authorities equally relevant to the section 11A (1) issues in this case:

> "Section 11A(1) of the Workers Compensation Act 1987 provides:
>
> > 'No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.'
>
> In a claim for compensation for psychological injury, the Commission has to decide whether the whole or predominant cause of the psychological injury was the employer's action or proposed action with respect to one or more of the actions listed in s 11A(1), and, if so, whether the action or proposed action was reasonable (*Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; 19 NSWCCR 181 at [4])."

52. The onus of establishing a s 11A(1) defence is on the employer (*Ritchie v Department of Community Services* [1998] NSWCC 40; (1998) 16 NSWCCR 727; *Department of Education and Training v Sinclair* [2005] NSWCA 465; 4 DDCR 206; (*Sinclair*)).

S 11A(1) category of action by employer

53. The evidence establishes that the action taken by Mr Mathison was disciplinary in nature, rather than performance appraisal. As submitted for Mr Ratto, performance appraisal is defined quite differently to the apparent process initiated in this instance. Geraghty J in *Irwin v Director-General of School Education* (Unreported, NSW Compensation Court, Matter No. 14068/97) (*Irwin*) said that performance appraisal is "formal, somewhat like an examination or a test rather than an extended and continuing assessment". The circumstances of the process in this matter do not fit that definition.

Wholly or predominantly

54. The concepts "wholly" and "predominantly" need to be considered separately.[1] The expression "wholly or predominantly" has been held to mean "mainly or principally" caused.[2]

55. In *Manly Pacific International Hotel Pty Ltd v Doyle* [1999] NSWCA 465; (1999) 19 NSWCCR 181 Fitzgerald JA said whether actions, in respect of one of the specified matters, were the whole or predominant cause of psychological injury was "a question of fact and degree, which involves consideration of all the factors which produced (the worker's) condition".

56. This issue is a significant one for the respondent to prove in the circumstances of this matter. Mr Ratto states that he had experienced difficulties with Mr Mathison and Mr McDermott for over two years before the end of 2018. This is consistent with the history taken by the medical practitioners and that history is not contradicted.

57. Dr Vickery's opinion that the injury "is predominately related to Mr Ratto's reaction to the perceived inappropriate process and procedures of actions taken by the employer" is somewhat confusing as this could include many of the behaviours of Mr Mathison. However, it does not include the behaviours of Mr McDermott who was Mr Ratto's subordinate.

58. Dr Vickery's opinion does not sufficiently take account of the long history of problems Mr Ratto experienced before Mr Mathison began the series of meetings about performance. Nor does it take enough account of the ongoing issues other than the discipline process afterwards. The real issue for Mr Ratto was feeling undermined and "useless" because of the behaviour of Mr Mathison and Mr McDermott which had nothing to do with a process of discipline. The purported process over alleged underperformance was not seen by Mr Ratto as of significance, but as just one more element in the long history of unfairness from Mr Mathison.

59. Dr Smith is of the opinion that the cause of the condition was the significant occupational conflict with Mr Mathison and Mr McDermott. This is a much larger element in Mr Ratto's distress than the purported disciplinary process, as he says in reply to the employer's letter of outcome regarding his formal complaints. I prefer Dr Smith's opinion to that of Dr Vickery for these reasons. Ms Stevens also does not report a history that Mr Mathison's raising of performance allegations was of any significance to Mr Ratto other than as part of the overall treatment meted out by Mr Mathison.

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[1] *Smith v Roads and Traffic Authority of NSW* [2008] NSWWCCPD 130

[2] *Kooragang Cement Pty Ltd v Bates*' (1994) 35 NSWLR 452; *Ponnan v George Weston Foods Ltd* [2007] NSWWCCPD 92; *Temelkov v Kemblawarra Portuguese Sports and Social Club* [2008] NSWWCCPD 96

60. It seems to me that the evidence overall, which the documents relating to the experience of former colleagues tend to corroborate, is of a "toxic" work environment that had persisted for some two years and which formed the basis of Mr Ratto's psychological decompensation, with the performance issues raised by Mr Mathison being only one element of no greater significance than many others. The disciplinary process occurred towards the end of a long period during which Mr Ratto was suffering stress but attempting to retrieve his situation, without success.

61. For these reasons I find the employer's action regarding discipline was not wholly or predominantly the cause of Mr Ratto's psychological injury.

Reasonable action

62. The issue of reasonable action should also be addressed in case I am wrong on the issue of wholly or predominantly.

63. The Court of Appeal considered the meaning of the words "reasonable action" in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57, in which the Court cited with approval the following passage from *Irwin v Director-General of School Education* (Unreported, NSW Compensation Court, Matter No. 14068/97) where Judge Geraghty said:

> "The question of reasonableness is one of fact, weighing all the relevant factors. The test is less demanding than the test of necessity, but more demanding than a test of convenience. The test of 'reasonableness' is objective, and must weigh the rights of employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by a question of fairness."

64. The assessment of whether an employer has acted reasonably requires an objective assessment of the conduct involved (*Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138 at [50]) (*Jeffery*), and not the subjective opinions of the employer or worker.

65. In *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998), Truss CCJ said: "In my view when considering the concept of reasonable action, the Court is required to have regard not only to the end result but to the manner in which it was effected."

66. Reasonableness is judged having regard to fairness appropriate in the circumstances, including what went before or after a particular action (Burke J in *Melder v Ausbowl Pty Ltd* [1997] 15 NSWCCR 454). Armitage J in *Jackson v Work Directions Australia Pty Ltd* [1998] NSWCC 45 stated "only if the employer's action in all the circumstances was fair could it be said to be reasonable."

67. In *Sinclair* Spigelman CJ observed that one must look at the entire process to see if it was reasonable action within s 11A. That includes looking at the circumstances surrounding the action, both before and after the action.

68. In *Balranald Shire Council v Walsh* [2013] NSWWCCPD 47 at [50] an employer's failure to follow its own procedures in relation matters of discipline led to a finding that the employer's actions were not proven to be reasonable.

69. Mr Ratto raises many questions as to the policies and procedures of the respondent regarding the meetings held with Mr Mathison, for example the lack of an agenda and the lack of opportunity to have a support person present. Mr Ratto refers to specific policies that he says were not followed.

70. The difficulty for the respondent in discharging the onus is that there is no material before me that establishes that a reasonable disciplinary process occurred. The evidence for Mr Ratto suggests that there were many flaws in the process. The performance issues raised by Mr Mathison arose in the context of a larger picture of historical conflict between he and Mr Ratto that had existed for a considerable time prior. In this scenario it is difficult for the respondent to establish that the discipline process was reasonable. Doubts are raised as to the fairness of such a process when it was instigated and conducted by Mr Mathison. For example, there is no evidence before me that would establish that the respondent followed its own procedures given Mr Ratto says it did not.

71. The "Outcome" letter after Mr Ratto's formal complaints is of little assistance because it is not direct evidence as to the details raised by Mr Ratto and is essentially hearsay. The document in any case appears to assess many issues in terms of bullying and harassment which is not part of the test of reasonableness, as can be seen from the above authorities. The letter says the process around alleged performance issues was reasonable action, but the test is objective and does not depend on the opinion of the employer or worker (see *Jeffery*).

72. Mr Ratto's evidence is not contradicted by probative material for the respondent and this is insufficient for the respondent to succeed. I find that the respondent has not discharged the onus regarding reasonable action.

73. For the above reasons the respondent's defence under s 11A(1) of the 1987 Act is not made out.

Work capacity

74. As the respondent submits, s 32A of the 1987 Act stipulates that suitable employment is what the worker is capable of without regard to whether such work is available.

75. As extracted above, the weight of the medical evidence supports a finding of total incapacity to date. Dr Vickery says that in May 2019 there was capacity to work anywhere except the unit where the injury occurred. Dr Smith says the incapacity was total in July 2019 and that more treatment was needed before a return to work was possible.

76. The respondent submits that there is no basis for an award beyond September 2019 which is the last medical evidence. Dr Smith said on 12 July 2019, "… over time and with improvement he will have the capacity to gradually return to work. I would anticipate that this may occur in the next three to six months." Dr Naumovski certified Mr Ratto on 9 September 2019 as totally unfit for at least a further two months then and he suggests any return to work would depend on "circumstances of work and management". This takes it up to 9 December 2019 and there is no evidence to suggest anything has changed.

77. Ms Stevens' opinion is that the degree of depression and anxiety would make it difficult to return to work as at July 2019, but that it might be possible with improvement in the condition with changes to the work situation, but that an alternative position would be preferable.

78. I prefer the opinion of Dr Smith on work capacity over Dr Vickery as it is more consistent with the other evidence. I find Mr Ratto has no current work capacity for the period claimed to date.

79. There were no submissions made as to the pre-injury average earnings (PIAWE). The applicant has a Wages Schedule in the Application to Resolve a Dispute showing a figure for that. The respondent does not rely on a schedule. The PIAWE figure in the applicant's rather brief schedule is $2,816.69 from 1 July 2019 to date. Applying ss 36 and 37 of the 1987 Act as governed by s 34(1) and Division 6 gives weekly compensation from 1 July 2019 to 30 September 2019 at the rate of $2,177.40; and from 1 October 2019 to date at the rate of $2,195.70.

Medical expenses

80. It follows from the above finding that Mr Ratto is entitled to s 60 medical expenses for the compensable injury.

SUMMARY

81. The respondent's defence pursuant to s 11A(1) of the 1987 Act fails.

82. Mr Ratto is entitled to weekly compensation based on no current work capacity for the period claimed.

83. Mr Ratto is entitled to s 60 of the 1987 Act medical expenses.