

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6094/19
Applicant: David Simister
Respondent: The Trustees of the Society of St Vincent de Paul (NSW)
Date of Determination: 2 April 2020
Citation: [2020] NSWCC 105

The Commission determines:

1. The applicant suffered a primary psychological injury in the course of his employment with the respondent on 10 September 2018 within the meaning of section 4(a) of the *Workers Compensation Act 1987*, to which employment was a substantial contributing factor within the meaning of section 9A of the *Workers Compensation Act 1987*.
2. The respondent has not discharged its onus of establishing on the balance of probabilities that the disciplinary “action” was reasonable within the meaning of section 11A(1) of the *Workers Compensation Act 1987* and has not made out its defence in this regard.
3. The applicant had no current work capacity within the meaning of section 32A of the *Workers Compensation Act 1987* during the period 4 February 2019 to 25 July 2019.
4. The applicant had a current work capacity within the meaning of section 32A of the *Workers Compensation Act 1987* as a Teacher’s Aide for 20 hours per week at \$672.80 per week from 26 July 2019 to 9 December 2019.
5. The applicant had a current work capacity within the meaning of section 32A of the *Workers Compensation Act 1987* as a Teacher’s Aide for 25 hours per week at \$807.25 per week from 10 December 2019 to 10 February 2020.
6. The applicant was able to return to full time employment (not in the welfare industry), where he would have been able to earn the equivalent or more than he was earning with the respondent from 11 February 2020.

The Commission orders:

7. The respondent is to pay the applicant weekly compensation in respect of the primary psychological injury on 10 September 2018 as follows:
 - (a) \$1,195.99 per week from 4 February 2019 to 25 July 2019 under section 37(1) of the *Workers Compensation Act 1987*.
 - (b) \$774.44 per week from 26 July 2019 to 9 December 2019 under section 37(2) of the *Workers Compensation Act 1987*.
 - (c) \$612.99 per week from 10 December 2019 to 10 February 2020 under section 37(2) of the *Workers Compensation Act 1987*.
 - (d) Liberty to apply within 14 days in relation to the calculation of weekly benefits.

8. The respondent is to pay the applicant's reasonably necessary medical and related expenses as a result of the primary psychological injury on 10 September 2018 under section 60 of the *Workers Compensation Act 1987*.

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

Anthony Scarcella
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 ANTHONY SCARCELLA, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. The applicant, Mr David Simister, is a 52-year-old man who was employed by The Trustees of the Society of St Vincent de Paul NSW (the respondent) as an Accommodation Team Leader.
2. Mr Simister alleged that in the 12 to 18 month period preceding 10 September 2018, he was subjected to significant stress in the workplace due to the burden of responsibility placed on him, the nature of his duties and the constant aggression and unrest caused by the residents in a crisis accommodation facility for homeless men (John Purcell House), which resulted in him suffering a primary psychological injury.
3. Sometime after 10 September 2018, Mr Simister lodged a claim for weekly benefits and medical expenses under the *Workers Compensation Act 1987* (the 1987 Act) with Catholic Church Insurance Limited (CCI), the insurer of the respondent. Mr Simister received weekly benefits compensation from CCI until 3 February 2019.
4. On 21 January 2019, CCI issued a Dispute Notice pursuant to section 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) denying injury within the meaning of sections 4 and 9A of the 1987 Act and denying an entitlement to reasonably necessary medical and related treatment expenses as a result of injury within the meaning of sections 59 and 60 of the 1987 Act. In the alternative, CCI raised a defence under section 11A of the 1987 Act, namely, that any psychological injury was wholly or predominantly caused by the reasonable actions taken by the respondent with respect to discipline.¹
5. On 12 February 2019, Mr Simister, through his lawyers, requested a review of the decision contained in CCI's Dispute Notice dated 21 January 2019 under section 287A of the 1998 Act.
6. On 26 February 2019, CCI issued a Dispute Notice pursuant to section 78 of the 1998 Act maintaining its decision to deny liability.²
7. Mr Simister lodged an Application to Resolve a Dispute (ARD) dated 20 November 2019 in the Workers Compensation Commission (the Commission) claiming weekly benefits compensation from 22 January 2019 to date and continuing under section 37 of the 1987 Act and medical and related expenses under section 60 of the 1987 Act, as a result of the alleged primary psychological injury sustained in the course of his employment with the respondent on 10 September 2018.

ISSUES FOR DETERMINATION

8. The parties agreed that the following issues remained for determination:
 - (a) Did Mr Simister suffer a primary psychological injury on 10 September 2018 within the meaning of sections 4(a) and 9A of the 1987 Act?
 - (b) In the alternative, did Mr Simister suffer a primary psychological condition by gradual process within the meaning of section 4(b)(i) of the 1987 Act with a deemed date of 10 September 2018.

¹ Application to Resolve a Dispute at pages 12-15

² Application to Resolve a Dispute at pages 233-237

- (c) Has the respondent's defence pursuant to section 11A(1) of the 1987 Act been made out, namely, whether it has established that Mr Simister's primary psychological injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to discipline?
- (d) Is Mr Simister entitled to weekly payments for total or partial incapacity within the meaning of section 33 of the 1987 Act arising from his alleged primary psychological injury during the period claimed? If so, did he have a current work capacity to work in suitable employment within the meaning of section 32A of the 1987 Act during the period claimed? What is the extent and quantification of his entitlement to weekly compensation within the meaning of section 37 of the 1987 Act?
- (e) Are Mr Simister's medical and related treatment expenses reasonably necessary as a result of injury within the meaning of sections 59 and 60 of the 1987 Act?

Matters previously notified as disputed

9. The issues in dispute were notified in the Dispute Notices referred to above.

Matters not previously notified

10. No other issues were raised.

PROCEDURE BEFORE THE COMMISSION

- 11. The parties attended a conciliation conference/arbitration in Wagga Wagga on 13 February 2020. Mr John Davis of counsel appeared for Mr Simister and Mr Josh Beran of counsel appeared for the respondent.
- 12. During the conciliation phase the parties agreed as follows:
 - (a) If he obtains an award in his favour, Mr Simister's claim for weekly benefits compensation commences on 4 February 2019.
 - (b) Mr Simister's pre-injury average weekly earnings (PIAWE) are agreed at \$1,494.99 per week.
 - (c) Mr Simister commenced employment with the NSW Department of Education on 26 July 2019.
 - (d) If Mr Simister obtains an award in his favour, a general order for reasonably necessary medical, hospital and related expenses under section 60 of the 1987 Act is appropriate.
- 13. I am satisfied that the parties to the dispute understood the nature of the application and the legal implications of any assertion made in the information supplied. I 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

Documentary Evidence

14. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) ARD dated 20 November 2019 and attached documents;
 - (b) Respondent's Application to Admit Late Documents dated 16 December 2019 and the attached Reply dated 16 December 2019;
 - (c) Applicant's Application to Admit Late Documents dated 23 January 2020 and attached documents;
 - (d) Applicant's Application to Admit Late Documents dated 13 February 2020 and attached documents.

Oral Evidence

15. Neither party sought leave to adduce oral evidence from or to cross-examine any witness.

SUBMISSIONS

16. The parties made oral submissions at the arbitration hearing which were sound recorded. The sound recording is available to the parties. I will refer to the parties' submissions under each relevant issue for determination set out below.

FINDINGS AND REASONS

Did Mr Simister suffer a primary psychological injury within the meaning of sections 4 and 9A of the 1987 Act?

17. 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.
18. Section 4(a) of the 1987 Act defines 'injury' as a personal injury arising out of or in the course of employment. Section 4(b) provides that 'injury' includes a 'disease injury'. 'Disease injury' means 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: section 4(b)(i); and, 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: section 4(b)(ii).
19. "Psychological Injury" is defined in section 11A(3) of the 1987 Act as follows:
- "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 of the nervous system."
20. The onus of establishing injury falls on Mr Simister and the standard of proof is on the balance of probabilities, meaning that I must be satisfied to a degree of actual persuasion or affirmative satisfaction: *Department of Education and Training v Ireland*³ (*Ireland*) and *Nguyen v Cosmopolitan Homes*⁴ (*Nguyen*).

³ *Department of Education and Training v Ireland* [2008] NSWCCPD 134

⁴ *Nguyen v Cosmopolitan Homes* [2008] NSWCA 246

21. The issue of causation must be based and determined on the facts in each case and requires a common sense evaluation of the causal chain: *Kooragang Cement Pty Ltd v Bates*⁵ (*Kooragang*). As I understand it, when referring to applying “common sense”, Kirby, P in *Kooragang* was not suggesting that it be applied “at large” or that issues were to be determined by “common sense” alone but by a careful analysis of the evidence, including a careful analysis of the expert evidence: *Kirunda v State of New South Wales (No 4)*⁶ (*Kirunda*). The legislation must be interpreted by reference to the terms of the statute and its context in a fashion that best effects its purpose.
22. In order to prove that a psychological injury has occurred, Mr Simister must prove that either the nervous system was so affected, that a physiological effect was induced or that there has been an aggravation, acceleration, exacerbation or deterioration of a pre-existing psychiatric condition. Mere emotional impulse, anxiety state, frustration and emotional upset, or a “straight litigation neurosis”⁷ do not constitute psychological injury.⁸ A finding of psychological injury requires expert evidence that such an injury is present.⁹
23. Whether a psychological condition is classified as a personal injury or a disease depends on the evidence in each case. It is necessary that the events complained of had a physiological effect on the worker for it to be found that a worker with a psychological condition has received a personal injury.¹⁰
24. The High Court of Australia described a personal injury under section 4(a) of the 1987 Act as a “sudden or identifiable physiological change”¹¹ and as “a sudden and ascertainable or dramatic physiological change or disturbance of the normal physiological state”.¹² However, “suddenness” is not necessary for there to be “injury” in the primary sense.¹³
25. Whether a worker has suffered a physiological effect that satisfies the test for a personal injury in section 4(a) of the 1987 Act will depend on the nature and severity of his or her symptoms. However, the terms “disease” and “personal injury” in section 4 of the 1987 Act are not mutually exclusive¹⁴ and the difference will not usually be of critical importance. As noted by Gleeson CJ and Kirby J in *Petkoska*:

“The disease provisions remain as alternative and additional heads of entitlement where a disease pathology exists with the appropriate employment connection, and does not manifest itself in the kind of sudden physiological change or disturbance of the normal physiological state that will constitute an ‘injury’ in the primary sense.”¹⁵

⁵ *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; 10 NSWCCR 796

⁶ *Kirunda v State of New South Wales (No 4)* [2018] NSWWCPCPD 45 at [136]

⁷ *New South Wales v Rattenbury* [2015] NSW WCCPD46

⁸ *Stewart v New South Wales Police Service* (1998) 17 NSWCCR 202

⁹ *HammondCare v Calka* [2016] NSWWCPCPD 2 at [118]-[123]

¹⁰ *Yates v South Kirkby Collieries Ltd* [1910] 2 KB 538; *Anderson Meat Packing Co Pty Ltd v Giacomantonio* [1973] 47 WCR 3

¹¹ *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310 (*Zickar*) per Brennan CJ, Dawson and Gaudron JJ at 716

¹² *Kennedy Cleaning Services Pty Ltd v Petkoska* [2000] HCA 45; 200 CLR 286 per Gleeson CJ and Kirby J at 300 [39] (*Petkoska*)

¹³ *Military Rehabilitation and Compensation Commission v May* [2016] HCA 19 at [47]

¹⁴ *Zickar v MGH Plastic Industries Pty Ltd* [1996] HCA 31; 187 CLR 310

¹⁵ *Petkoska* at [40]

26. The significance of a worker's perception of the actions of an employer has been considered by the Commission in *AAP Information Services Pty Ltd v Hanson*,¹⁶ and *State Transit Authority (NSW) v Chemler (Chemler)*;¹⁷ *Leigh Sheridan v Q-Comp*;¹⁸ *Callingham v Tophos Pty Ltd*,¹⁹ and *Wiegand v Comcare Australia (Wiegand)*.²⁰
27. In considering the issue of establishing psychological injury in circumstances of the worker's perception of events at work, Roche DP in *Attorney General's Department v K (K)*²¹, provided the following useful summary of the relevant authorities on this issue:
- “(a) employers take their employees as they find them. There is an ‘egg-shell psyche’ principle which is the equivalent of the ‘egg-shelled 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 have 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.” (at [52])
28. In *Baker v Southern Metropolitan Cemeteries Trust*²², applying the passage from *K* set out above, 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.
29. Adopting the approach of Roche DP in *K*, the test is whether the events within the workplace were real, rather than imaginary. Further, it does not matter that the events affected the worker's psyche due to a flawed perception of events of a disordered mind. The critical question is whether the event or events complained of occurred in the workplace. If they did, and the worker perceived them as creating a difficult 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/her personality and circumstances. It is not necessary to establish that the worker's response was “rational, reasonable and proportional”.

¹⁶ *AAP Information Services Pty Ltd v Hanson* [2009] NSWCCPD 24

¹⁷ *State Transit Authority (NSW) v Chemler* [2007] NSWCA 249

¹⁸ *Leigh Sheridan v Q-Comp* [2009] QIC 12

¹⁹ *Callingham v Tophos Pty Ltd* [2008] NSWCCPD 140

²⁰ *Wiegand v Comcare Australia* [2002] FCA 1474

²¹ *Attorney General's Department v K* [2010] NSWCCPD 76

²² *Baker v Southern Metropolitan Cemeteries Trust* [2015] NSWCCPD 56

30. The respondents' principal submissions may be summarised as follows:

- (a) Events in the course of employment may be stressful but are not necessarily causative of psychological injury.
- (b) The impact of the alleged events in the course of Mr Simister's employment with the respondent were relatively minor.
- (c) A significant part of Mr Simister's email statement dated 13 September 2018 focussed on the effect the disciplinary meeting had on him.
- (d) In Mr Simister's statement dated 22 September 2018, he set out a number of events in the workplace that caused his psychological symptoms. However, he did not refer to a fire extinguisher being thrown at him. He referred to being micromanaged; dealing with a staff member who stole medication; and the like. The evidence demonstrates that many of the events did occur but what needs to be determined is what impact those events had and whether they were causative of a psychological injury.
- (e) Mr Simister did not report any of the events he complained of in the workplace to his general practitioner, who has been treating him for over 10 years.
- (f) Mr Simister's evidence was that, when the allegation of using inappropriate language to a client was raised in the disciplinary meeting, his anxiety "went through the roof". He felt blindsided by the allegation and it caught him by surprise.
- (g) The evidence demonstrates that Mr Simister's first six allegations or events were not causative of the psychological condition. They did not outweigh the psychological effect of the disciplinary meeting.
- (h) Mr Simister was no stranger to raising with his general practitioner psychological issues that were unrelated to the workplace. The clinical records demonstrated that Mr Simister was diagnosed with depression by his general practitioner in 2010 and prescribed Zoloft. In 2011, the clinical records disclosed that Mr Simister had issues with sleeping and drank alcohol to get to sleep. Zoloft was prescribed. Poor sleep was again identified in 2015.
- (i) On 10 September 2018, Mr Simister attended his general practitioner and did not mention the disciplinary meeting. A meeting that, on his own evidence, significantly affected him.
- (j) Mr Simister's workplace supervision session notes for the period 9 February 2018 to 12 July 2018 are in evidence. He was provided with the opportunity to provide comments to the respondent as to whether there were any stressors in the workplace and raise any issues. The highest score he rated himself on an analogue scale (1 - 10) for stress was at 2.5.
- (k) The onus is on Mr Simister to prove that the alleged events occurred over a period of time to a point where he decompensated and outweighed the predominant cause, being the disciplinary action. There was no contemporaneous evidence that supported that the alleged events occurred over a period of time to a point where Mr Simister decompensated.

- (l) Dr Whetton supports the proposition that the managerial action was the predominant cause of Mr Simister's psychological condition.
- (m) Mr Simister did not provide Dr Bertucen with the details of his complaints over the 18 month period preceding 10 September 2018. He provided some history which was not borne out in his statements. There is no reference to a lack of support in Dr Bertucen's evidence. Dr Bertucen's opinion does not carry any weight as there is no fair climate for the opinion expressed to have been reached.
- (n) If Mr Simister sustained a psychological injury, it was an injury within the meaning of section 4(a) of the 1987 Act, that is, a frank injury. There was the disciplinary meeting where he decompensated and consulted his doctor a few days later. The alternative argument that there were psychological traumata over a period of time, was not borne out in the evidence. Dr Bertucen is the only support for what is essentially a nature and conditions of employment type injury, where the information he relies on to make his diagnosis is not borne out in the evidence.

31. Mr Simister's principal submissions may be summarised as follows:

- (a) The submission that Mr Simister did not provide Dr Bertucen with the details of his complaints over the 18 month period preceding 10 September 2018 is incorrect. Mr Simister's statement dated 22 September 2019 referred to the residents he was dealing with as being ex-prisoners, who were released from gaol and looking to blend back into society. Many of them had drug and alcohol dependencies and some, had mental health issues.
- (b) The work Mr Simister was performing and the lack of support he received in a number of the events referred to, were partially causative of his ultimate breakdown. Over time, things had been building up for Mr Simister. Perhaps there were undercurrents of which Mr Simister was unaware. Mr Simister was the type who did not want to complain. He was concerned about losing his job if he raised issues.
- (c) Dr Whetton supported the view that Mr Simister suffered a psychological injury.

32. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

33. In evidence, there is, what is referred to in the ARD as, a "Statement/Email" by Mr Simister dated 13 September 2018 addressed to his lawyers.²³ Mr Simister stated that his employment with the respondent progressed from that of a Support Worker to Accommodation Team Leader (Manager) of John Purcell House, which was a hostel providing crisis accommodation for up to 17 homeless men. He had experienced many highly stressful situations in the workplace including, the death of a resident; being verbally abused on many occasions; being threatened; having had a fire extinguisher thrown at him; having to manage and deal with staff; and being bullied and ill-treated by other managers and staff members. These experiences had taken their toll on his mental well-being. However, Mr Simister did not provide any details about the verbal abuse he alleged he had been subject to. He did not provide any details of the incident of a fire extinguisher having been thrown at him. He did not provide any details of instances where he had been bullied and ill-treated by other managers and staff members.

34. Mr Simister stated that during his employment with the respondent, his work ethics or behaviour had never been questioned. This evidence was unchallenged. He had never received any warnings, nor had he been called up for any work performance issues until the previous Wednesday (5 September 2018, which he incorrectly referred to as 13 May 2018).

²³ ARD at page 1

He referred to receiving a letter from the respondent,²⁴ wherein he was informed that he was to meet with his Regional Manager and an HR representative the following day, 6 September 2018 (the disciplinary meeting). He stated that the accusations made against him and the manner in which they were handled had devastated him. He felt lost and totally betrayed by the respondent's staff. He was diagnosed with PTSD, anxiety and depression. One week after the meeting, he was still waiting on a decision as to whether his employment was to be terminated. He had been informed that it was highly possible. He lodged a workers compensation claim with the respondent on 13 September 2018.

35. In evidence, there is a more detailed statement by Mr Simister dated 22 September 2018 taken by an investigator engaged by CCI.²⁵ Mr Simister stated that he commenced his employment with the respondent on 29 November 2012. He was based at John Purcell House in Nowra, where he had the day-to-day running of the crisis accommodation centre for men. Mr Simister's role included ensuring the proper running of the facility (catering and laundry); staff rostering and payrolls for the six staff members under his supervision and dealing with the "day to day dramas that are involved".²⁶ Some of the centre's clients (residents) were ex-prisoners recently released from gaol; many residents had drug and alcohol dependencies and some residents had mental health issues.
36. Mr Simister then went on to describe a series of seven events or issues he had to deal with in his workplace over the preceding 18 months and culminating with the disciplinary meeting on 6 September 2018. He stated that some of these events were revisited by him in his mind over and over. He tried to put these matters behind him, but he felt depressed and the symptoms escalated over time. He did not report his condition to the respondent as he believed it could have jeopardised his position. He tried to cope with the way he was feeling "and kept it internal".²⁷ It will be necessary for me to deal with the seven events or issues and make findings in relation to them.
37. Mr Simister stated that one of the biggest issues that caused depression and anxiety in the workplace was dealing with staff. At the time he commenced his employment with the respondent there was so much bad behaviour in the workplace by employees, that he had to get rid of staff and problem employees. He then went on to provide examples of the events that affected him psychologically. I cannot give any weight to Mr Simister's self-diagnosis that dealing with staff caused him depression. A finding of psychological injury requires expert evidence that such an injury is present.²⁸ I must look to the available medical evidence, if any.
38. The first event raised by Mr Simister was that of an employee who commenced his shift by walking in the front door, then straight out the back door and only returning at the end of his shift. In this circumstance, Mr Simister felt that he had not been properly supported by the respondent and it resulted in a "messy" outcome.
39. In response to the first event raised by Mr Simister, the respondent's State Manager, Mr Brett Macklin, stated that he had no knowledge of the issue and added that, had it been reported, he and HR would have acted accordingly.²⁹ The respondent's HR Partner, Ms Tracey McNamara, stated that she had no knowledge of the incident and presumed that it had occurred prior to her appointment in HR.³⁰ The respondent's Regional Manager, Ms Jennifer Dixon, stated that she had no knowledge of the incident, other than comments that Mr Simister had made to her laughingly about it being the type of thing they used to have to deal with, but had since improved.³¹

²⁴ ARD at page 143

²⁵ ARD at pages 35-45

²⁶ ARD at page 37 at [36]

²⁷ ARD at page 39 at [57]

²⁸ *HammondCare v Calka* [2016] NSWCCPD 2 at [118]-[123]

²⁹ ARD at pages 47-48 at [12]

³⁰ ARD at page 59 at [12]

³¹ ARD at page 71 at [16]

40. Mr Simister's response to the evidence provided by the respondent to the first event was set out in his supplementary statement dated 22 January 2020,³² where he added that the same employee was permitting residents, who were on strict curfew conditions to come and go throughout the night by leaving the side door unlocked. A resident lodged a complaint. Mr Simister lodged a Client Incident Report dated 30 January 2017.³³ Mr Simister stated that the Client Incident Report confirmed that his Line Manager and HR were informed immediately. Further, an email from him to his Line Manager and HR, copying in Mr Macklin, dated 14 March 2017 and a reply were evidence of Mr Macklin's knowledge of the matter.³⁴
41. Whilst the first event raised by Mr Simister may have caused him stress, anxiety, emotional upset and/or frustration, I find that there is no evidence that the event complained of had the necessary physiological effect referred to in the legal principles referred to above on Mr Simister to enable me to find a recognisable psychological condition caused by it on its own. The alleged depression was not reported to the Basin View Medical Centre, being the medical practice he attended for general practitioner consultations.³⁵ Mr Simister was able to continue his normal duties with the respondent. Any impact on Mr Simister was transient.
42. The second event raised by Mr Simister was where he had to deal with a female employee who was sleeping with a client on the premises. It was a traumatic event for Mr Simister. The client reported that the employee was having an affair with him when she was doing sleepover shifts. When Mr Simister had to report the employee's behaviour, he was shaking and panicking because the client was on parole. He reported the incident to the Parole Board. He informed the respondent about the breach of protocol and advised the respondent that he had contacted the Parole Board. He felt that the respondent was very disappointed that he had reported the incident to the Parole Board. It made Mr Simister feel like their service had let the resident down. He found that day left him feeling psychologically exhausted.
43. In response to the second event raised by Mr Simister, Mr Macklin stated that he found the allegation confusing because the case worker was Karen, who reported to Ms Sarah Date and not to Mr Simister. He was unaware that Mr Simister had reported the incident to the Parole Board and there was no reason for him to do so. Mr Simister should have reported the incident to either his direct supervisor or HR, if it was unethical or putting the client at risk. Mr Simister never mentioned the incident to him or gave any indication that he required assistance or that he was struggling.³⁶ Ms McNamara stated that she believed the employee concerned was terminated. The employee concerned reported to Ms Date and not Mr Simister. She was unaware of any reason why Mr Simister would have reported the incident to the Parole Board because the client was not in breach of his parole conditions and it was the employee who was in the wrong, not the client. Mr Simister should have reported the incident to his manager. As the incident occurred before she had commenced in HR, she was unable to comment on whether Mr Simister appeared psychologically exhausted or troubled by the incident.³⁷ Ms Dixon stated that the incident occurred "prior to her time" but her understanding was similar to the evidence of Ms McNamara.³⁸

³² Applicant's Application to Admit Late Documents dated 23 January 2020 at page 1 at [3(i)]

³³ Applicant's Application to Admit Late Documents dated 23 January 2020 at pages 5-6

³⁴ Applicant's Application to Admit Late Documents dated 23 January 2020 at page 7

³⁵ ARD at pages 252-275

³⁶ ARD at page 48 at [14]-[16]

³⁷ ARD at page 59 at [14]-[18]

³⁸ ARD at page 72 at [18]-[20]

44. Mr Simister's response to the evidence provided by the respondent to the second event was set out in his supplementary statement dated 22 January 2020³⁹ where he relied on and attached the relevant Client Incident Report dated 30 January 2017.⁴⁰ The Client Incident Report provided relevant details of the event, including a statement that the resident involved no longer wished to remain at John Purcell House. The document noted that, as the resident was at John Purcell House under the TSA program, Mr Simister contacted the District Manager of Nowra Community Corrections to make him aware of the situation. The resident was taken to Community Corrections where he was granted permission to stay in a Nowra motel under his current program for the following three nights funded by the John Purcell House CM team.
45. Whilst the second event raised by Mr Simister may have caused him stress, anxiety, emotional upset and/or frustration, I find that there is no evidence that the event complained of had the necessary physiological effect referred to in the legal principles referred to above on Mr Simister to enable me to find a recognisable psychological condition caused by it on its own. The alleged depression was not reported to the Basin View Medical Centre. Mr Simister was able to continue his normal duties with the respondent. Any impact on Mr Simister was transient.
46. The third event raised by Mr Simister was an occasion when an employee was observed by him on CCTV medicating a client that was clearly affected by ice. The client reported to Mr Simister that he was on ice and also reported the incident. The incident became a major HR issue. Mr Simister acted promptly. However, senior management did not act on it until two weeks later and the worker was not put off because the union became involved. Mr Simister felt that the employee's employment ought to have been terminated immediately and he felt let down by management. Further, a lot of time and effort was wasted on a matter that should have been acted on immediately.
47. In response to the third event raised by Mr Simister, Mr Macklin stated that he had received an email from Mr Simister in relation to the issue. He acknowledged ongoing issues with the employee concerned. The two week delay in responding to Mr Simister's email was either an oversight or because Mr Macklin was on leave. It was not a failure to support Mr Simister. He did not consider that there was sufficient evidence to terminate the employee. Had he dealt with Mr Simister's email on the day he received it, the outcome would not have altered. Mr Simister was frustrated. He did not request any guidance or support.⁴¹ Ms McNamara stated that Mr Simister had emailed Mr Macklin about the issue on 11 August 2017 and 21 August 2017, and that Mr Macklin responded on 23 August 2017. Mr Macklin requested Mr Simister to contact HR who could advise him of the next steps to be taken. It was not a major HR issue. The union was not involved. Ms McNamara felt that Mr Simister had an issue with the employee concerned and wanted him terminated. The incident was investigated. The CCTV footage was reviewed with the employee and Mr Simister. The outcome was a warning letter to the employee and some further training. In Ms McNamara's view it was not a dismissal offence. Another HR Partner became involved and thought that the delay in dealing with the incident precluded the employee being dismissed. Mr Simister was given assistance and support throughout the investigation and Ms McNamara ran the meetings.⁴² Ms Dixon stated that the incident occurred before her employment commenced. However, she was aware of it as the relevant employee had since been terminated. The employee did approach the union, who argued that if the incident had been so serious, he should have been stood down immediately. Ms Dixon was not sure whether the incident on its own would have been a dismissal event. The employee was later dismissed for a combination of issues, the subject incident being one of them. In Ms Dixon's conversations with Mr Simister about the incident, he expressed frustration about it.⁴³

³⁹ Applicant's Application to Admit Late Documents dated 23 January 2020 at page 1 at [3(ii)]

⁴⁰ Applicant's Application to Admit Late Documents dated 23 January 2020 at pages 8-10

⁴¹ ARD at page 49 at [20]-[25]

⁴² ARD at pages 60-61 at [20]-[26]

⁴³ ARD at page 73 at [22]-[25]

48. Mr Simister's response to the evidence provided by the respondent to the third event was set out in his supplementary statement dated 22 January 2020,⁴⁴ where he relied on an email from Mr Macklin dated 23 August 2017⁴⁵ and letters from the respondent to the employee involved dated 15 September 2017 and 5 October 2017.⁴⁶
49. Whilst the third event raised by Mr Simister may have caused him stress, anxiety, emotional upset and/or frustration, I find that there is no evidence that the event complained of had the necessary physiological effect referred to in the legal principles referred to above on Mr Simister to enable me to find a recognisable psychological condition caused by it on its own. The alleged depression was not reported to the Basin View Medical Centre. Mr Simister was able to continue his normal duties with the respondent. Any impact on Mr Simister was transient.
50. The fourth event raised by Mr Simister was where he had to deal with an employee who was stealing drugs and medications from the work medicine safe. The matter turned into a long major HR investigation that impacted on Mr Simister and took a heavy psychological toll.
51. In response to the fourth event raised by Mr Simister, Mr Macklin stated that he was unaware of the incident and it was never brought to his attention by Mr Simister. There was never any evidence that the incident took a heavy psychological toll on Mr Simister.⁴⁷ Ms McNamara stated that she was not involved with the incident and had no knowledge of it. She assumed that it had occurred before her appointment to HR.⁴⁸ Ms Dixon stated that she had never heard of this incident.⁴⁹
52. Mr Simister's response to the evidence provided by the respondent to the fourth event was set out in his supplementary statement dated 22 January 2020⁵⁰ where he relied on his email to Ms Leanne Crilly, Regional Manager, detailing the incident.⁵¹
53. Whilst the fourth event raised by Mr Simister may have caused him stress, anxiety, emotional upset and/or frustration, I find that there is no evidence that the event complained of had the necessary physiological effect referred to in the legal principles referred to above on Mr Simister to enable me to find a recognisable psychological condition caused by it on its own. The alleged depression was not reported to the Basin View Medical Centre. Mr Simister was able to continue his normal duties with the respondent. Any impact on Mr Simister was transient.
54. The fifth event raised by Mr Simister related to his interactions with Ms Date, a Team Leader in charge of Case Management, who he described as a "living nightmare".⁵² Mr Simister explained that Ms Date was a continual troublemaker, in that, she was involved in employee backstabbing, creating rumours and turning worker against worker, which he found, over time, to be very mentally exhausting. He recalled that on one occasion, Ms Date's boyfriend stuck his head in Mr Simister's car window and threatened him because Mr Simister had reported Ms Date working from home instead of being on the road. The boyfriend's abuse and threats frightened him, and he did not know what to do about them. However, he did not report it because he felt it would create more "dramas"⁵³ for HR and issues that he did not believe he could deal with.

⁴⁴ Applicant's Application to Admit Late Documents dated 23 January 2020 at page 1 at [3(iii)]

⁴⁵ Applicant's Application to Admit Late Documents dated 23 January 2020 at page 17

⁴⁶ Applicant's Application to Admit Late Documents dated 23 January 2020 at pages 12-15

⁴⁷ ARD at page 50 at [27]-[28]

⁴⁸ ARD at page 61 at [28]

⁴⁹ ARD at page 73 at [27]

⁵⁰ Applicant's Application to Admit Late Documents dated 23 January 2020 at page 1 at [3(iv)]

⁵¹ Applicant's Application to Admit Late Documents dated 23 January 2020 at pages 21-22

⁵² ARD at page 40 at [67]

⁵³ ARD at page 40 at [68]

55. In response to the fifth event raised by Mr Simister, Mr Macklin stated that Ms Date had been on workers compensation since January 2018, claiming stress, anxiety and PTSD. An external workplace investigation was conducted in relation to her alleged actions. There had been no previous formal complaints about her. He was aware that Sara, Mr Simister and others in the group would go out drinking together and sometimes issues arose. Mr Simister did not report the alleged threat from Ms Date's boyfriend.⁵⁴ Ms McNamara stated that Ms Date made complaints primarily against Mr Simister, but also against other staff members. She confirmed that Ms Date had been on workers compensation since January 2018 claiming stress, anxiety and PTSD. There had been no previous formal complaints about Ms Date. Ms McNamara had never heard Mr Simister report the alleged threat from Ms Date's boyfriend.⁵⁵ Ms Dixon corroborated the evidence of Mr Macklin and Ms McNamara on this issue.⁵⁶
56. Whilst the fifth event raised by Mr Simister may have caused him distress, anxiety, emotional upset and/or frustration, I find that there is no evidence that the event complained of had the necessary physiological effect referred to in the legal principles referred to above on Mr Simister to enable me to find a recognisable psychological condition caused by it on its own. The alleged depression was not reported to the Basin View Medical Centre. Mr Simister was able to continue his normal duties with the respondent. Any impact on Mr Simister was transient.
57. The sixth event raised by Mr Simister was the continual and unnecessary micromanaging and undermining of his work by the Regional Manager, Ms Leanne Criley. Mr Simister referred to an example of such behaviour when a resident died at the centre. Mr Simister was on call and went on site. The police attended. Ms Criley was instructed by her manager not to attend the incident. However, she attended and antagonised Mr Simister and the police by telling them what to do. She also antagonised another employee who had provided mouth-to-mouth resuscitation to the deceased client. Ms Criley's management of the situation and behaviour caused more stress and problems than necessary.
58. In response to the sixth event raised by Mr Simister, Mr Macklin stated that he recalled the incident when a client overdosed on site and both Ms Criley and Mr Simister attended in response. As Regional Manager, Ms Criley should definitely have attended to support staff, other residents and assist police. Mr Macklin was Ms Criley's manager at the time and he denied instructing her not to attend the site. He was not aware of Ms Criley acting inappropriately at the time. Mr Simister made no formal complaints about Ms Criley at the time but did criticise her actions in the debriefing. He considered Mr Simister's criticisms unfounded. Ms Criley informed him that Mr Simister was "a bit tanked up" when he attended the site. Mr Simister never displayed any signs or required any assistance following the incident. He was offered EAP. He never gave any impression that he required further assistance or support.⁵⁷ Ms McNamara stated that Mr Macklin had more information about the incident. However, she stated that Ms Criley was definitely required to attend the incident in her position as Regional Manager. In fact, it would be concerning if she had not attended a death on site.⁵⁸ Ms Dixon stated that she was aware of the death on site as Mr Simister had mentioned it. She observed that when Mr Simister mentioned it to her, he expressed his frustration that Ms Criley had attended. He thought that she was a micromanager. Ms Dixon believed that it was unrealistic for Mr Simister to think that, as a Regional Manager, Ms Criley would not attend such an incident. She was unaware of any impact the incident had on Mr Simister or what assistance or support was provided to him.⁵⁹

⁵⁴ ARD at page 51 at [30]-[33]

⁵⁵ ARD at page 62 at [30]-[34]

⁵⁶ ARD at page 74 at [29]-[32]

⁵⁷ ARD at page 51-52 at [36]-[43]

⁵⁸ ARD at page 63 at [37]-[39]

⁵⁹ ARD at page 75 at [35]-[39]

59. Whilst the sixth event raised by Mr Simister may have caused him distress, stress, anxiety, emotional upset and/or frustration, I find that there is no evidence that the event complained of had the necessary physiological effect referred to in the legal principles referred to above on Mr Simister to enable me to find a recognisable psychological condition caused by it on its own. The alleged depression was not reported to the Basin View Medical Centre. Mr Simister was able to continue his normal duties with the respondent. Any impact on Mr Simister was transient.
60. The seventh and final event raised by Mr Simister was the receipt of the disciplinary meeting letter dated 5 September 2018⁶⁰ and the disciplinary meeting that took place at John Purcell House on 6 September 2018. This issue was described by Mr Simister as being “the straw that broke the camels [sic] back”.⁶¹
61. The respondent’s disciplinary meeting letter addressed to Mr Simister dated 5 September 2018 invited him to attend a meeting at John Purcell House on 6 September 2018 at 2:00 pm to discuss allegations that he had used inappropriate language in the workplace and was in breach of his employment obligations. The letter stated that Mr Simister would have the opportunity to respond to the allegations contained in the letter at the meeting. The letter summarised the respondent’s concerns and allegations as follows:

“During the week commencing 20 August 2018, in the daily morning Case Management handover meeting, you allegedly put your arm around a colleague and said words to the effect of ‘you’re a friendly nigger’.”⁶²

The letter went on to state, amongst other things, that the respondent considered the allegations to be serious and that if substantiated, disciplinary action may be taken. Mr Simister was encouraged to have a support person present at the meeting and was advised that Ms Dixon and Ms McNamara would be present.

62. In his evidentiary statement dated 22 September 2018, Mr Simister identified the work colleague referred to in the disciplinary meeting letter as Mrs Stacey Ellard, a Maori by birth with whom he had been very good friends for over eight years. She had been a guest at his wedding. He explained exchanges between himself and Mrs Ellard as follows:

“We have a personal bantering, which is private between ourselves, where she calls me ‘Vanilla’, because of my white heritage, and I call her ‘Chocolate’, because of her Maori heritage. This is very personal banter between us, and based on many years of friendship and trust.”⁶³

63. Mr Simister described the incident which was the subject of the disciplinary meeting letter dated 5 September 2018 as follows:

“During a staff handover one morning, in August 2018, where I put my arm on her [Mrs Ellard’s] shoulder, and said jovially ‘You’re a friendly nigger’, and I remember Stacey [Mrs Ellard] laughing out loud at that joke between us. It was friendly and cordial, there was no malice or disrespect whatsoever.”⁶⁴

Mr Simister subsequently deduced that the comment must have been overheard by a staff member who was not aware of the joking and banter which took place between he and Mrs Ellard and so, a complaint was made.

⁶⁰ ARD at page 143

⁶¹ ARD at page 40 at [70]

⁶² ARD at page 143

⁶³ ARD at pages 40-41 at [73]

⁶⁴ ARD at page 41 at [74]

64. In evidence, there is a statement by Mrs Stacey Ellard dated 17 October 2018 taken by an investigator appointed by CCI.⁶⁵ Mrs Ellard described Mr Simister as being a friend with whom she had always had a good working relationship. She confirmed that she attended his wedding. She referred to a Case Management handover meeting in or about the week commencing 20 August 2018, where Mr Simister referred to her as a “nigger”. She could not recall in what context he used the word. The comment was made as Mr Simister was about to walk out of the room at the end of the handover meeting. She stated that she knew the comment was in jest. She did not recall Mr Simister putting his hand on her shoulder. She stated that she was embarrassed for Mr Simister as he had used that word in front of others in the workplace and she knew that it was inappropriate. She confirmed that Mr Simister had called her “nigger” before as well as “chocolate”; and that she had called him “vanilla bean” and “vanilla”, in and out of the workplace. She was not offended by his comment. She cannot recall, but she probably laughed at the time. There had been banter between them in the workplace before, but usually not in front of others.
65. Mrs Ellard stated that, at the time Mr Simister made the comment, Lisa Rothque, Andrew, an English placement student from Wollongong University and Lewis, an aboriginal case worker were present. Michael McNeil might also have been present. She had observed the body language of the others present after Mr Simister made the comment and apologised to them after he had left the room. She did not report the incident but believed that it was reported by the supervisor of the English placement student. Mrs Ellard then referred to Mr Simister’s conversation with a resident that had been recorded in her meeting notes by Ms McNamara on 6 September 2018. She also denied that she had ever heard or said to anyone that Mr Simister had used the words “get the fuck out of my office”. She had heard him use the terms “junkie” and “troublemaker” in handover meetings and had told him that he should not be referring to clients in that way. She was not aware of him having used any other inappropriate language. She stated that Mr Simister was normally very respectful of the clients.
66. In evidence, there is a statement by Ms Lisa Rothque dated 17 October 2018 taken by an investigator appointed by CCI.⁶⁶ Ms Rothque stated that she was present at a Case Management handover meeting during the week commencing 20 August 2018 when Mr Simister said to Mrs Ellard: “Stacey, she’s my lovely nigger” whilst placing a hand on Ms Ellard’s shoulder.⁶⁷ The remark was definitely made in jest. Present at the time of the handover meeting were Andrew Jaggog, a placement student and Lewis McLeod, a case worker, who identifies as aboriginal. She was shocked at the comment. Mr Simister had never used that word in the workplace before. She thought that Lewis may have been offended and that Andrew was probably shocked. She admonished Mr Simister and he responded by saying that Mrs Ellard knew he was just joking. She observed that Mrs Ellard smiled at the time and confirmed that Mrs Ellard later apologised to her for their banter. She did not recall Mrs Ellard and Mr Simister referring to each other as “vanilla” and “chocolate”.
67. Ms Rothque stated that she reported the incident because the student had documented it in his journal and that journal entry would be seen by someone at his university. She later informed the student that Mr Simister’s language in the workplace had been inappropriate. Ms Rothque stated that Mr Simister had told her that he had sworn at a client and used the “F” word. However, she was not aware of Mr Simister having sworn at clients on any other occasions. Mr Simister denied that he had told Ms Rothque that he had sworn at a client and used the “F” word and is consistent with Mrs Ellard’s evidence.⁶⁸

⁶⁵ ARD at pages 81-85

⁶⁶ ARD at pages 86-88

⁶⁷ ARD at page 87 at [9]

⁶⁸ Applicant's Application to Admit Late Documents dated 23 January 2020 at page 2 at [3(v)]

68. In evidence, there is the respondent's file note recording a summary of a meeting that took place with Mrs Ellard at John Purcell House on 6 September 2018 at about 1:00 pm.⁶⁹ In attendance on behalf of the respondent were Ms Dixon, Regional Manager and Ms McNamara, HR Partner. Amongst other things, the file note recorded that Mrs Ellard did not mind that Mr Simister put his hand around her and called her a friendly nigger, but she did feel that it was inappropriate. Mrs Ellard had spoken to Mr Simister previously about being more professional at work as they had previously joked a lot and said inappropriate things at work. It was recorded that Mrs Ellard spoke to Mr Simister about the incident and that he was apologetic. It was also recorded that Mrs Ellard stated that language in the accommodation team generally was deteriorating and becoming derogatory of the residents. An example of inappropriate language was recorded as Support Workers calling residents "junkies". Another example was where Mr Simister used derogatory language in an exchange with a resident about his state of sobriety on returning to the accommodation centre. Another example was of a Support Worker accusing a resident of being inebriated when the resident had brain damage. It was recorded that Mrs Ellard considered such behaviour as bullying and intimidation towards residents.
69. In evidence, there is the respondent's file note recording a summary of the disciplinary meeting that took place with Mr Simister at John Purcell House on 6 September 2018 at about 2:30 pm. In attendance on behalf of the respondent were Ms Dixon, Regional Manager and Ms McNamara, HR Partner.
70. In relation to the incident the subject of the disciplinary meeting, the following relevant statements were attributed to Mr Simister in the file note dated 6 September 2018:
- (a) He did not recall using the word "nigger" but said that he and Mrs Ellard sometimes called each other "vanilla" and "chocolate". He would be surprised if he used the word "nigger" because he usually used the word "chocolate".
 - (b) He acknowledged that the words he used were inappropriate and that others could take it the wrong way. He had had a conversation with Mrs Ellard about being more professional at work and not using those terms anymore.
 - (c) There was no intention of malice or racism. He was joking, he put his arm around Mrs Ellard's shoulder and whispered to her as a joke. He agreed that it should not have occurred.
71. The subject disciplinary meeting file note recorded Ms Dixon raising reports of the accommodation team using inappropriate language when talking about residents, such as, "junkies" and "pissed". It was recorded that Mr Simister stated there had been a decrease in professionalism recently but that he did not know such language was being used. He committed to speak to the accommodation team about the use of language. The file note then recorded that Ms Dixon put to Mr Simister that he had allegedly asked a resident "were you pissed last night?" and said, "I don't care that you were in hospital" and "I don't want to hear that anymore". Mr Simister had not been given notice about this allegation. It clearly came from the earlier meeting with Mrs Ellard and was raised by Ms Dixon without notice. It was recorded that Mr Simister stated that he used the words "you were intoxicated last night". He denied dismissing the fact that the resident had been to hospital. The conversation was stern but not elevated. The resident returned to apologise to Mr Simister five minutes later. Mr Simister was recorded as saying that he would ensure that his language was appropriate in future.

⁶⁹ ARD at page 146

72. The subject disciplinary meeting file note concluded by recording that Mr Simister enquired as to the possible outcomes of the disciplinary meeting and what timeframes he should expect. It was recorded that Ms Dixon and Ms McNamara explained that Mr Simister's response would have to be considered and be referred to Shane and Niamh to make a decision. A commitment was made by Ms McNamara to telephone Mr Simister by Monday, 9 September 2018 to advise of the progress of the process.

73. In his evidentiary statement dated 22 September 2018, Mr Simister gave evidence about the respondent's disciplinary meeting on 6 September 2018 and what followed immediately afterwards. He stated that after the incident with Mrs Ellard was discussed, another issue was raised by Ms Dixon and Ms McNamara where they said that Mrs Ellard claimed he had told a client to "fuck off" out of my office following a meeting. Mr Simister denied using those words and stated that he said to the client:

"you have told me three times you were in hospital yesterday, but the real reason we are talking now is that you were intoxicated in here yesterday, and you need to take ownership of it."⁷⁰

Mr Simister stated that the client then admitted that he had been intoxicated. Mr Simister requested the client to sign a final warning letter. The client did so and left the office. The client also apologised for being intoxicated in the office on the previous day. Mr Simister stated that he had no idea the issue was going to be raised. It was not raised in the letter dated 5 September 2018.

74. Mr Simister described his feelings following the disciplinary meeting in the following terms:

"My anxiety went through the roof at this stage. I felt like I had been blind-sided by this allegation, and it caught me by surprise."⁷¹

75. Earlier in the meeting, Mr Simister had informed Ms Dixon and Ms McNamara that he had offered an apology for the language he used to Mrs Ellard and offered to make a full apology and explanation at the next staff meeting. Towards the conclusion of the disciplinary meeting, Mr Simister enquired about the potential outcome. Ms Dixon informed him that it could result in termination once the process went through HR. He then enquired as to when he would find out about the outcome and Ms Dixon advised him "next Monday".⁷² Mr Simister stated that Ms Dixon then said to him:

"It's gonna be a long weekend for you to find out on Monday".⁷³

Mr Simister stated that the latter comment by Ms Dixon made him feel sick and nauseous. He wanted to burst out crying. He felt gutted and asked to be excused. He went back to his desk.

76. Mr Simister stated that he sat at his desk feeling overwhelmed. He stated that after he left the meeting, he had been made to feel like a criminal; his integrity had been questioned; and he felt that he had been dealt with very harshly over a matter that could have been dealt with at a lesser level. Ms McNamara approached him and asked if he was ok. He advised her that he was not. She asked if he wanted to go home, he responded in the affirmative and left the workplace.

⁷⁰ ARD at page 41 at [77]

⁷¹ ARD at page 41 at [78]

⁷² ARD at page 41 at [80]

⁷³ ARD at page 41 at [80]

77. In response to the seventh and final event raised by Mr Simister, Ms Dixon stated that Ms Rothque had reported the incident involving Mrs Ellard and Mr Simister to her. Ms Dixon stated that prior to the disciplinary meeting with Mr Simister she and Ms McNamara had interviewed Mrs Ellard. Mrs Ellard informed them that she was not personally offended by Mr Simister's comment at the handover meeting, but she did not think it was appropriate in the workplace. Also present at the handover meeting were Ms Rothque, Andrew, a placement student and Lewis, an aboriginal man. Ms Dixon requested Ms Rothque to speak to Lewis as part of his supervision and not as part of this investigation. Ms Rothque informed her that Lewis had forgotten about the incident. Mrs Ellard then raised some other concerns she had about general language in the workplace, including an incident where Mr Simister allegedly yelled at a client and used expletives. Ms Dixon stated that they did raise the concerns about language in the workplace in the disciplinary meeting with Mr Simister but made it clear to him that the two incidents were separate and that the reason for the meeting was the incident with Mrs Ellard. Ms Dixon confirmed that she did say to Mr Simister that it would be a long weekend for him to find out the outcome on Monday. However, she stated that it was said in an understanding and sympathetic manner. This was inconsistent with Ms McNamara's evidence that they were just going to provide an update on the progress of the investigation. She stated that the investigation was currently on hold pending Mr Simister's return to work and that he had been informed of this.⁷⁴
78. In response to seventh and final event raised by Mr Simister, Ms McNamara confirmed that Mr Simister's disciplinary meeting took place on 6 September 2018 and that Ms Dixon was also present. Ms McNamara took notes during the meeting. Ms McNamara stated that during the meeting, Mr Simister raised that he always acted in a professional manner when he spoke to colleagues. Ms Dixon then mentioned some of the other comments he had allegedly made but denied that Ms Dixon had ever said that he had told the client to "f*** off". The meeting definitely concentrated on his use of the word "nigger". She denied that they questioned Mr Simister's integrity. She believed that management had followed and acted in accordance with the relevant policies and procedures when addressing the incident with Mrs Ellard. She stated that they acted promptly and kept Mr Simister up-to-date on the progress of the investigation. Ms McNamara stated that she followed up Mr Simister on the Monday following the disciplinary meeting and informed him that she would send him a copy of the notes of the meeting. She also advised him that she could not inform him of the outcome of the disciplinary meeting whilst he was on sick leave. Mr Simister denied receiving a telephone call from Ms McNamara on 10 September 2018.⁷⁵ She denied having informed Mr Simister that he would have an outcome on Monday, 10 September 2018. They were just going to provide an update on the progress of the investigation. The matter had to be referred to Brett for him to consider the action to be taken. She stated that at no time, did they threaten Mr Simister's position in the meeting. She would not have recommended or supported a termination of Mr Simister's employment.⁷⁶
79. Mr Simister stated that once he arrived home following the disciplinary meeting on 6 September 2018, he felt gutted, empty and he felt like his career with the respondent was all for nothing. The following day, he was off work. He had never felt so depressed and disillusioned before. He was not able to obtain an appointment with his usual general practitioner at the Basin View Medical Centre until Monday, 10 September 2018, when he consulted Dr Chaminda Hettige. Dr Hettige diagnosed him as suffering from depression, anxiety and PTSD. He was advised to remain off work for two weeks and returned to review on 24 September 2018. Dr Hettige prescribed one tablet of Mirtazapine 15 mg to be taken nightly.⁷⁷

⁷⁴ ARD at pages 78-79

⁷⁵ Applicant's Application to Admit Late Documents dated 23 January 2020 at page 2 at [3(v)]

⁷⁶ ARD at pages 65-67

⁷⁷ ARD at page 42 at [64]-[67]

80. On 10 September 2018, Dr Hettige reported his diagnosis as being anxiety, depression and PTSD.⁷⁸ Dr Hettige referred to Mr Simister providing a history of facing and dealing with clients in the workplace with various psycho-social issues, including drug use, that had escalated over the past 18 months to a point where he could not stand it anymore. There was also reference to a recent letter from his employer referring to incidents where his work had been questioned (the disciplinary meeting). The presenting symptoms were recorded as increased anxiety and panic at times; an inability to stop thinking of traumatic events faced at work even after coming home; difficulty sleeping; and slightly low mood.
81. Mr Simister telephoned Ms Dixon and informed her of the outcome of his consultation with Dr Hettige and, in particular, that he been certified unfit for work for two weeks.
82. On 24 September 2018, Dr Mario Farina, Clinical Psychologist, reported to CCI that Mr Simister suffered from acute stress-driven adjustment disorder with anxiety and depression reactive to his workplace conditions.⁷⁹ Dr Farina did not provide details of the workplace conditions referred to. Dr Farina reported that Mr Simister endorsed extremely severe levels of psychological distress (depression, anxiety and stress) on the 21-item Depression Anxiety Stress Scale (DASS-21).
83. On 22 November 2018, Dr Whetton examined Mr Simister at the request of CCI. On 5 December 2018, Dr Whetton reported that he had reviewed all relevant documents necessary to provide his comprehensive report from the file that had been forwarded to him. However, the documents are not identified.
84. Dr Whetton recorded a history that Mr Simister last worked on 6 September 2018 and that at the time he ceased work, he had been issued with a direction to attend a meeting regarding allegations that had been levelled against him at work. Mr Simister stated that the meeting “was the straw that broke the camel’s back”. Following the meeting, Mr Simister stated that he felt “devastated, betrayed and backstabbed”. The rug had been pulled from under him. He had a work record with no blemishes and described himself as emotionally upset and tearful in relation to the allegations that had been made against him. He felt embarrassed and fearful as to how he could face work in the future.
85. Dr Whetton diagnosed an adjustment disorder with anxiety and depression and alcohol misuse. He opined that Mr Simister’s condition occurred in the course of employment and particularly, as a result of the allegations made against him by the respondent, which he considered to be unreasonable and unjust. Dr Whetton considered those allegations to be a substantial factor to the injury.
86. On 16 July 2019, Mr Simister consulted Dr Jeff Bertucen, Consultant Psychiatrist at the request of his lawyers. In evidence, there is a report by Dr Bertucen dated 16 July 2019.⁸⁰ Dr Bertucen was provided with copies of the documents referred to in the letter of instructions from Mr Simister’s lawyers dated 22 May 2019⁸¹ and included, amongst other documents, the claims investigation report dated 26 October 2018 and enclosures; Mr Simister’s diary notes; the Beneco Rehab initial assessment report dated 6 November 2019; Dr Farina’s report dated 24 September 2018 and Dr Whetton’s reports dated 5 December 2018 and 14 December 2018.

⁷⁸ ARD at page 239

⁷⁹ ARD at page 240

⁸⁰ ARD at pages 297-304

⁸¹ ARD at pages 243-245

87. On 16 July 2019, Dr Bertucen took a history from Mr Simister which may be summarised as follows:
- (a) Mr Simister's role was a difficult one, dealing with challenging behaviours from a number of individuals from lower socio-economic levels of society, many of whom were aggressive, abusive or consumed alcohol/drugs in the facility.
 - (b) Mr Simister had been physically attacked on numerous occasions, had fire extinguishers thrown at him, had been the recipient of punches, kicks and abusive language on a regular basis.
 - (c) Mr Simister had the additional burden of team leader, which included duties which were unfamiliar to him such as, rostering, recruitment, assessments and budgeting.
 - (d) At least over the past 12 to 18 months, prior to his withdrawal from work, Mr Simister was experiencing significant stress in the workplace due to the burden of responsibility, the range of his duties as well as a constant background of aggression and unrest from residents. During this time, he recalled symptoms of sleep disturbance, irritability and hypervigilance.
 - (e) By the time of the disciplinary meeting in September 2018, Mr Simister was already beginning to experience significant features of "burnout".
 - (f) Mr Simister provided a history of the disciplinary meeting on 6 September 2018, which was consistent with the evidence. At the end of the meeting, Mr Simister was informed that he would need to return in five days' time to be made aware of the outcome. The manager would not be drawn on any conclusions beforehand.
88. On the history presented to him by Mr Simister, Dr Bertucen opined:
- "Mr Simister emotionally decompensated after the meeting and stated that at one point he had to pull over to the side of the road and had a panic attack."⁸²
89. In Dr Bertucen's report under the heading "Psychological Sequelae", he reported that Mr Simister believed that he was experiencing progressively severe anguish and distress as a result of his workplace duties. It was already affecting his sleep quality and energy levels throughout the day and resulted in uncharacteristic irritability and impatience at home. However, following the 6 September 2018 disciplinary meeting, his mental state rapidly regressed and he reported feeling lethargic, unable to sleep, spontaneous tearfulness, isolated at home and having a pervasive sense of mistrust of others. He ruminated constantly about the workplace situation and felt incapable of organising a challenge to the accusations made against him in clearing his name. A weight loss of 5 kg to 6 kg was reported over the following three to four months and there was an increase in alcohol consumption to hazardous levels.
90. On mental state examination, Dr Bertucen observed Mr Simister to be moderately depressed. He was oriented to time, place and person and his sensorium was clear. Dr Bertucen diagnosed chronic adjustment disorder with features of depressed and anxious mood, being a similar diagnosis to that of Dr Whetton.
91. Dr Bertucen opined that Mr Simister's disabilities were wholly or partly attributable to his workplace and stated:

⁸² ARD at page 299

“It would certainly appear from the file material as well as Mr Simister's account that the psychological injuries have been caused by cumulative exposure to stressful situations within the workplace for at least 18 months (a high frequency of exposure to aggressive or abusive residents added to a number of burdensome administrative duties) and the final "coup de grace" would appear to be have been the meeting of 6 September 2018 in which he was unexpectedly accused of inappropriate behaviour by a colleague whom he suspects was angling for his job.”

92. Dr Bertucen opined that Mr Simister’s psychological injuries were caused by his cumulative exposure to stressful situations within the workplace for the 18 months preceding the disciplinary meeting as asserted by Mr Simister and based on the documentary material provided, which contrary to the respondent’s submissions, included the documentation referred to in [86] above. However, the evidence does not support this conclusion. Mr Simister’s assertion to Dr Bertucen that he believed that he was experiencing progressively severe anguish and distress as a result of his workplace duties; that it was already affecting his sleep quality and energy levels throughout the day; and resulted in uncharacteristic irritability and impatience at home; was not borne out by the evidence.
93. Whilst the events raised by Mr Simister in his “Statement/Email” dated 13 September 2018 and his evidentiary statement dated 22 September 2018 may have caused him varying degrees of stress, anxiety, emotional upset and/or frustration, I find that there is no evidence that the events complained of had the necessary physiological effect referred to in the legal principles referred to above on Mr Simister to enable me to find a recognisable psychological condition caused by them cumulatively. Mr Simister’s self-diagnosed depression during the 18 months preceding the disciplinary meeting was not reported to the Basin View Medical Centre. Mr Simister was able to continue his normal duties with the respondent after each event. There were no references to the events, or any resultant stress caused by them in the limited supervision reports relating to Mr Simister in evidence.⁸³
94. In reaching his conclusion, I am concerned about how much weight Dr Bertucen placed on Mr Simister’s assertion that, on the balance of probabilities, even if the disciplinary meeting had not taken place, at some point in time he would have been overwhelmed by work-related psychological injuries and withdrawn from the workplace. I cannot give this assertion any weight. Firstly, the evidence does not support it. Secondly, it did not happen.
95. I prefer the opinion of Dr Whetton over that of Dr Bertucen in relation to the issue of causation. Dr Whetton opined that Mr Simister’s psychological condition was caused “particularly”, as a result of the allegations made against him by the respondent (the disciplinary action), which he considered to be unreasonable and unjust. Whilst Dr Bertucen referred to the cumulative exposure to stressful situations in the workplace, he too identified the disciplinary meeting as being the “coup de grace”.
96. I accept Mr Simister’s evidence of the symptoms he suffered following the disciplinary meeting on 6 September 2018.
97. I am satisfied on the balance of probabilities, to a degree of actual persuasion or affirmative satisfaction, that Mr Simister has established that there was a definite or distinct physiological change or disturbance in his psychological condition in the form of an adjustment disorder with anxiety and depression arising out of or in the course of his employment with the respondent following the disciplinary meeting on 6 September 2018.

⁸³ ARD at pages 96-109

98. Accordingly, I find that Mr Simister sustained a personal injury arising out of or in the course of his employment with the respondent on 10 September 2018 within the meaning of section 4(a) of the 1987 Act.
99. The parties made no submissions in relation to section 9A of the 1987 Act but for completeness, I have considered the factors set out in section 9A(2) of the 1987 Act. I am satisfied and find that there was a causal relationship between the injury and his employment on 10 September 2018, that is, there was a connection with his employment which was real and of substance. Accordingly, I am satisfied that Mr Simister's employment was a substantial contributing factor to his injury within the meaning of section 9A of the 1987 Act.

Did the respondent make out its defence under section 11A(1) of the 1987 Act?

100. There being a finding of psychological injury in favour of Mr Simister within the meaning of sections 4 and 9A of the 1987 Act, I now turn to the respondent's defence under section 11A(1) of the 1987 Act.
101. Section 11A(1) of the 1987 Act provides:
- "No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken 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".
102. Section 11A(1) of the 1987 Act is a disentitling provision and the respondent bears the onus of establishing on the balance of probabilities both that the "action" was, at least, the predominant cause of Mr Simister's primary psychological injury and that such an action was reasonable.⁸⁴ If both these elements are established, then Mr Simister's entitlement to compensation is extinguished by section 11A(1) of the 1987 Act.
103. Section 11A(1) of the 1987 Act uses the words "wholly or predominantly". It is important to appreciate that "wholly" and "predominantly" are separate concepts and a finding of one or the other needs to be considered.⁸⁵ The test of causation to be applied is that described in *Kooragang; Ponnann v George Weston Foods Ltd*⁸⁶ (*Ponnann*); *Temelkov v Kemblawarra Portuguese Sports and Social Club Ltd*⁸⁷; and *Smith v Roads and Traffic Authority of NSW*⁸⁸.
104. What is required by section 11A(1) is comparison between all of the employment related contributions to injury and those contributions as a result of reasonable actions by the employer: *ISS Property Services Pty Ltd v Milovanovic*.⁸⁹
105. The meaning of "predominantly caused" was considered in *Ponnann* in which Handley ADP at [24] applied the dictionary meaning of "mainly or principally caused". Roche DP agreed with this view in *McCarthy v Department of Corrective Services (McCarthy)*.⁹⁰
106. Section 11A(1) uses the words "reasonable action". In considering the issue of reasonableness, Geraghty J in *Irwin v Director General of School Education*⁹¹ said:

⁸⁴ *Department of Education and Training v Sinclair* [2005] NSWCA 465 (*Sinclair*)

⁸⁵ *Smith v Roads and Traffic Authority of NSW* [2008] NSWCCPD 130

⁸⁶ *Ponnann v George Weston Foods Ltd* [2007] NSWCCPD 92

⁸⁷ *Temelkov v Kemblawarra Portuguese Sports and Social Club Ltd* [2008] NSWCCPD 96

⁸⁸ *Smith v Roads and Traffic Authority of NSW* [2008] NSWCCPD 130

⁸⁹ *ISS Property Services Pty Ltd v Milovanovic* [2009] NSWCCPD 27 at [67]

⁹⁰ *McCarthy v Department of Corrective Services* [2010] NSWCCPD 27 at [157]

⁹¹ *Irwin v Director General of School Education* (NSWCC, Geraghty J No 14068/97, 18 June 1998, unreported)

“... The question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of reasonableness is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness.”

107. When considering the concept of reasonable action, the Commission is required to have regard not only to the end result, but to the manner in which it was effected.⁹² The question of whether the action is reasonable is one of fact involving an objective test and is not a matter of law.⁹³ One must look at the entire process to see if it was reasonable action within section 11A of the 1987 Act⁹⁴ and that includes looking at the circumstances surrounding the action, both before and after the action.⁹⁵ It also includes the rights of both employee and employer.⁹⁶ It is not for the Commission to consider whether the employer’s actions could have included other options or taken a different course.⁹⁷ The reasonableness of a person’s actions is assessed by reference to the circumstances known to that person at the time the action is taken.⁹⁸
108. An employer cannot rely on section 11A(1) of the 1987 Act because it held a genuine belief that its action was reasonable if, in all the circumstances, the Commission determines the action not to be reasonable.⁹⁹
109. The meaning of the word “discipline” in section 11A(1) of the 1987 Act was considered in *Kushwaha v Queanbeyan City Council (Kushwaha)*.¹⁰⁰ Neilson J held that the employer’s process of drawing the worker’s unsatisfactory work performance to her attention, asking her to improve her performance and suggesting ways of doing so and of offering assistance in training was “discipline”. Reprimands about standard of work come within the primary meaning of “discipline”.¹⁰¹ “Discipline” includes punishment inflicted by way of correction and training: *McCarthy*¹⁰² relying on *Kushwaha*.¹⁰³
110. In *Sinclair*, Spigelman CJ considered “action” with respect to discipline stating:

“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.”¹⁰⁴
111. The respondent’s principal submissions may be summarised as follows:
 - (a) Mr Simister’s psychological injury was predominantly caused by reasonable action taken by or on behalf of the respondent with respect to discipline.
 - (b) Dr Whetton supports the proposition that the managerial action taken by the respondent was the predominant cause of Mr Simister’s psychological condition.

⁹² *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998)

⁹³ *Commissioner of Police v Minahan* (2003) 1 DDCR 57; [2003] NSWCA 239

⁹⁴ *Department of Education and Training v Sinclair* [2005] NSWCA 465

⁹⁵ *Burton v Bi-Lo Pty Ltd* [1998] NSWCC 13; *Melder v Ausbowl Pty Ltd* [1997] 15 NSWCCR 454 at 458

⁹⁶ *Aristocrat Technologies Australia Pty Ltd v Rashov* [2005] NSWCCPD 66 at [82]

⁹⁷ *Hartley v Dux Manufacturing* [2008] NSWCCPD 55

⁹⁸ *Northern NSW Local Health Network v Heggie* [2013] NSWCA 225

⁹⁹ *Jeffery v Linitipal Pty Ltd* [2008] NSWCA 138

¹⁰⁰ *Kushwaha v Queanbeyan City Council* (2002) 23 NSWCCR 339 (*Kushwaha*)

¹⁰¹ *ISS Property Services Pty Ltd v Milovanovic* [2009] NSWCCPD 27 at [83]

¹⁰² *McCarthy v Department of Corrective Services* [2010] NSWCCPD 27 at [155]

¹⁰³ *Kushwaha* at [151]

¹⁰⁴ *Department of Education and Training v Sinclair* [2005] NSWCA 465 at [96]

- (c) Whilst there were allegations by Mr Simister of other events that occurred in the workplace, the predominant cause of the psychological injury diagnosed by Dr Whetton was the disciplinary meeting on 6 September 2018. The temporal connection between the disciplinary meeting and the cessation of employment supports the submission.
- (d) The respondent's actions were reasonable. The allegations in relation to Mr Simister's conversation with Mrs Ellard at the Case Management changeover meeting had been made out. Mr Simister did not deny that he used the words attributed to him. The allegation relating to other inappropriate language denied by Mr Simister but raised by another worker made it reasonable for the respondent to take action. Mrs Ellard's evidence supported Mr Simister having used inappropriate language to a client. In such circumstances, it supports the submission that the respondent's disciplinary action has been reasonable. The respondent was acting within its rights to bring the issue to Mr Simister's attention, where the purpose of the meeting was to discuss the use of inappropriate language in the workplace.
- (e) On the issue of reasonableness, Mr Simister was given the opportunity to review the disciplinary meeting notes dated 6 September 2018 and make comments. He did so.
- (f) If it is accepted that the respondent's disciplinary action was not reasonable, then even Dr Whetton supports Mr Simister's case.

112. Mr Simister's principal submissions may be summarised as follows:

- (a) The respondent has not discharged its onus in relation to section 11A(1) of the 1987 Act.
- (b) The "straw that broke the camel's back" was the allegation that Mr Simister used inappropriate language to clients. All the evidence in relation to this allegation is hearsay evidence. Mr Simister denied that he ever used such language to a client. The latter is the only evidence which should be given any weight in this regard. It was totally inappropriate to raise the issue at a meeting convened for another indiscretion. In relation to the latter indiscretion, the evidence of Mrs Ellard was that she took it in jest and took no offence. The evidence of Ms Rothque was that the statement was made in jest. It was conceded that it was probably something that should not have been said. Mr Simister apologised. There was no need to have the witch-hunt that is undertaken by the respondent. It warranted a verbal admonition. Undertaking a full-blown meeting and then raising other matters was not reasonable. Mr Simister was not given fair process.

113. The respondent's submissions in reply may be summarised as follows:

- (a) There is no evidence of a witch hunt. It was appropriate for the respondent employer to take action, especially where the inappropriate comments were made in front of a university student. The respondent simply had to do something.
- (b) It was highly reasonable, whether put in writing or not, for the respondent to raise in the meeting the other allegations of inappropriate language for discussion.

114. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

115. There is no issue that the respondent's action against Mr Simister related to discipline.
116. I am satisfied on the evidence and I find that Mr Simister's psychological injury was predominantly caused by the disciplinary action taken against him by the respondent. The temporal connection between the disciplinary meeting and the cessation of employment is a supporting factor in this finding. Dr Whetton supported the proposition that the managerial action taken by the respondent was the predominant cause of Mr Simister's psychological condition.¹⁰⁵ Whilst Dr Bertucen opined that Mr Simister's cumulative exposure to stressful situations within the workplace were causative of his psychological injury, he acknowledged that the disciplinary meeting on 6 September 2018 was the final "coup de grace". For the reasons already stated above, I prefer the opinion of Dr Whetton.
117. However, I disagree with the respondent's submission that its actions were reasonable.
118. Mr Simister was emailed a letter dated 5 September 2018 inviting him to attend a meeting in the workplace the following afternoon to discuss allegations that, in breach of his employment obligations, he had used inappropriate language in the workplace. At the meeting he would have the opportunity to respond to the allegations. The letter then particularised the allegation as:
- "During the week commencing 20 August 2018, in the daily morning Case Management handover meeting, you allegedly put your arm around a colleague and said words to the effect of 'you're a friendly nigger'."¹⁰⁶
- The letter went on to state, amongst other things, that the respondent considered the allegations to be serious and that if substantiated, disciplinary action may be taken. Mr Simister was encouraged to have a support person present at the meeting and was advised that Ms Dixon and Ms McNamara would be present.
119. Mr Simister did not bring a support person to the meeting. He felt that he did not need one. He was prepared to explain the circumstances of his interaction with Mrs Ellard to Ms Dixon and Ms McNamara. The evidence relating to the circumstances of the interaction has been referred to above. Mr Simister apologised for the language he used in addressing Mrs Ellard. The unchallenged evidence is that Mrs Ellard was not offended by the comment made by Mr Simister. Mr Simister agreed that it was inappropriate for him to make such a comment in the workplace and that would not occur again.
120. Then, without notice, Ms Dixon drew to Mr Simister's attention that there had been other reports of the accommodation team using inappropriate language when talking about clients as "junkies" and as being "pissed". Some discussion ensued between Ms Dixon and Mr Simister about a recent decrease in professionalism in the language being used by staff. Mr Simister stated that he was committed to speaking to the accommodation team about the use of their language. Then, once again without notice, Ms Dixon put to Mr Simister an allegation that he had allegedly asked a client whether he was "pissed" the previous night and that Mr Simister's reply had been dismissive in relation to having been informed by the client that he had been in hospital. Mr Simister provided his version of events including a denial of having used the word "pissed" or that he had been dismissive of the fact that the client had been to hospital.
121. The respondent submitted that it was reasonable for Ms Dixon to raise the specific issue without notice as the letter dated 5 September 2018 in its opening paragraph referred to inappropriate language in the workplace in general. I disagree. Mr Simister was given no notice of this fresh allegation. He was denied the opportunity to consider his position and prepare himself in relation to it. In short, I find that he was denied procedural fairness.

¹⁰⁵ ARD at page 187

¹⁰⁶ ARD at page 143

122. Towards the end of the meeting on 6 September 2018, Mr Simister requested an indication of possible outcomes and their timeframes. Ms McNamara and Ms Dixon explained that Mr Simister's response would have to be considered by two other representatives of the respondent's organisation. Ms McNamara committed to telephoning Mr Simister on 10 September 2018 to advise him of the progress of the process.
123. Mr Simister's evidence is that towards the conclusion of the disciplinary meeting, Ms Dixon informed him that the outcome could result in termination once the process went through HR. Ms Dixon said to him that it was going to be a long weekend for him to find out the outcome on Monday (it then being Thursday). However, she stated that it was said in an understanding and sympathetic manner. This was not Mr Simister's perception. It was also inconsistent with Ms McNamara's evidence that an update only would be provided on 10 September 2018. Mr Simister denied receiving a telephone call from Ms McNamara on the latter mentioned date.
124. On 10 September 2018, Mr Simister consulted his general practitioner who diagnosed him as suffering from depression, anxiety and PTSD. He issued Mr Simister with a medical certificate certifying him unfit for work for a period of two weeks. Mr Simister telephoned Ms Dixon and advised her of the outcome of his consultation with his general practitioner. Once the respondent was advised of Mr Simister's diagnosis and certification of unfitness for work, it took the view that the investigation should be put temporarily on hold. This position was confirmed in the respondent's letter to Mr Simister dated 27 September 2018.¹⁰⁷ The letter also stated:

"The Society appreciates that you have stated that you would prefer to be notified of the outcome of the investigation as early as possible, however your NDT COC states that you have no capacity for work.

Please note that when your NDT COC states that you are fit to attend a work-related meeting, I will organise a meeting with you to discuss the outcome of this investigation process."

There was no other explanation provided in the letter for putting the disciplinary outcome meeting on hold. I find this to have been unreasonable in the circumstances. This is particularly so when Ms Dixon acknowledged that it would be a long weekend for Mr Simister to await the outcome of the investigation, whether she used those words in an understanding and sympathetic manner or not.

125. After considering the circumstances before, during and after the disciplinary action and taking into account the rights of both parties, I find that the respondent's actions in relation to disciplining Mr Simister were not reasonable for the reasons stated above.
126. Accordingly, I find that the respondent has not discharged its onus of establishing on the balance of probabilities that the disciplinary "action" was reasonable within the meaning of section 11A(1) of the 1987 Act and has not made out its defence in this regard.

Is Mr Simister entitled to weekly payments for total or partial incapacity within the meaning of section 33 of the 1987 arising from his work-related primary psychological injury for the period claimed?

127. Section 33 of the 1987 Act provides that if total or partial incapacity for work results from an injury, the compensation payable by the employer under the Act to the injured worker shall include weekly payments during the period of incapacity.

¹⁰⁷ ARD at page 142

128. An assessment of Mr Simister's capacity involves a consideration of whether he has no current work capacity or a current work capacity as defined in section 32A of the 1987 Act.

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

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

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

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

a. having regard to:

- (i) The nature of the worker's incapacity and the details provided in medical information including, but not limited to, any certificate of capacity supplied by the worker (under section 44B), and
- (ii) the worker's age, education, skills and work experience, and
- (iii) any plan or document prepared as part of the return to work planning process, including an injury management plan under Chapter 3 of the 1998 Act, and
- (iv) any occupational rehabilitation services that are being, or have been, provided to or for the worker, and
- (v) such other matters as the WorkCover Guidelines may specify, and

b. regardless of:

- (i) whether the work or the employment is available, and
- (ii) whether the work or the employment is of a type or nature that is generally available in the employment market, and
- (iii) the nature of the worker's pre-injury employment, and
- (iv) the worker's place of residence.”

130. Section 43 of the 1987 Act in existence prior to the 2012 amending Act and the authorities suggested that regard was to be had to “the realities of the labour market in which the employee was working or might reasonably be expected to work”.¹⁰⁸

131. Since the 2012 amending Act, it is clear that “total incapacity” differs from “no current work capacity”. “No current work capacity” requires a consideration of the worker's capacity to undertake not only his or her pre-injury duties, but also suitable employment, irrespective of its availability. This was confirmed by Roche DP in *Mid North Coast Local Health District v De Boer*¹⁰⁹ and in *Wollongong Nursing Home Pty Ltd v Dewar*¹¹⁰ (*Dewar*).

132. I must assess whether Mr Simister was able to return to both his pre-injury duties and suitable employment since 10 September 2018.

133. I now turn to the application of the relevant legislation and the legal principles referred to above to the available evidence in this matter.

¹⁰⁸ *Arnott's Snack Products Pty Ltd v Yacob* [1985] HCA 2; 155 CLR 171

¹⁰⁹ *Mid North Coast Local Health District v De Boer* [2013] NSWCCPD 41

¹¹⁰ *Wollongong Nursing Home Pty Ltd v Dewar* [2014] NSWCCPD 55

134. The respondents' principal submissions may be summarised as follows:

- (a) Dr Whetton identified that Mr Simister could do menial work part time.
- (b) Mr Simister had a capacity for employment in February 2019, which is supported by the entry in his general practitioner's clinical records on 21 February 2019. Part of the entry on the latter mentioned date referred to Mr Simister understanding the need to move forward and find another job and look after his family.
- (c) Mr Simister stated that he would do a full-time job if it were offered to him and that there should be a finding that he could return to full-time employment as at the date of Dr Bertucen's report.
- (d) If the above submission is not accepted, Dr Bertucen identified Mr Simister's work capacity as being up to 20 hours per week as a Teacher's Aide at the date of his report.
- (e) Under section 37, earnings are not necessarily what Mr Simister is actually earning. Even working as a Teacher's Aide his full capacity would be 20 to 25 hours per week. Based on the Department of Education payslips in evidence, 20 hours per week as a Teacher's Aide comes to \$645.80 and 25 hours per week comes to \$807.25. Apart from the general practitioner's medical certificates, which it is submitted are ipse dixit, Mr Simister, having been removed from the stressor for a significant period of time, has full time work capacity now. Dr Bertucen's report is now five months old.

135. Mr Simister's principal submissions may be summarised as follows:

- (a) Dr Whetton supports an incapacity for work, in that, he opined that Mr Simister was only fit for menial tasks.
- (b) Dr Bertucen certified Mr Simister fit for work for 25 hours per week.
- (c) The Department of Education payslip in evidence dated 23 January 2020 gives a year to date earnings of \$17,249.26 gross over 27 weeks, which equals \$638.86. The agreed PIAWE is \$1,494.99 minus \$638.86 actual earnings results in an ongoing award of \$526.14 per week.

136. Mr Simister described his pre-injury duties with the respondent as an Accommodation Team Leader of John Purcell House as being responsible for the day to day running of the crisis accommodation centre. Mr Simister's role included ensuring the proper running of the facility (catering and laundry); staff rostering and payrolls for the six staff members under his supervision and dealing with the "day to day dramas that are involved".¹¹¹

137. Dr Whetton opined that at the time of his consultation with Mr Simister on 22 November 2018, he did not appear fit to undertake his pre-injury duties. Dr Whetton also opined that due to the state of his mental health, it was unlikely that Mr Simister could undertake employment other than at a menial level.¹¹²

138. Dr Bertucen opined that Mr Simister had no capacity for future employment in the welfare industry.¹¹³

¹¹¹ ARD at page 37 at [36]

¹¹² ARD at page 195

¹¹³ ARD at page 304

139. I am satisfied on the available medical evidence that Mr Simister would have had no capacity for his pre-injury duties for the period claimed and beyond.
140. The next matter for consideration is whether Mr Simister was fit for suitable employment as defined in section 32A of the 1987 Act. This requires a consideration of the nature of the incapacity and the details provided in the medical information, the worker's age, education, skills and work experience, any return to work plan and any occupational rehabilitation services that have been provided, irrespective of whether the work is available to him or of a type or nature that is generally available in the employment market.
141. On 1 March 2019, Dr Hettige issued a Centrelink medical certificate providing a diagnosis of anxiety, depression and PTSD. He identified the condition as temporary and that it would affect Mr Simister's capacity to work for 3 to 12 months. He certified Mr Simister unfit for work from 4 March 2019 to 3 June 2019.
142. On 16 July 2019, Dr Bertucen opined that Mr Simister was capable of possibly up to 20 hours per week of work as a Teacher's Aide. He further opined that full-time employment at that stage was desirable but may not be possible within the next six to nine months.
143. On 26 July 2019, Mr Simister commenced employment with the NSW Department of Education as a Teacher's Aide.
144. On 10 December 2019, Dr Hettige issued a certificate of capacity recording a diagnosis of anxiety, depression and PTSD. He certified Mr Simister as having capacity for some type of work from 10 December 2019 to 10 January 2020 five hours per day, five days per week.
145. On 21 January 2020, Dr Hettige issued a certificate of capacity recording a diagnosis of anxiety, depression and PTSD. He certified Mr Simister as having capacity for some type of work from 11 January 2020 to 10 February 2020 five hours per day, five days per week.
146. Mr Simister is a 52-year-old man who was educated to Year 11 at Parramatta High School. He successfully completed a TAFE Diploma in Community Services and Diploma in Case Management in 2014.¹¹⁴ After leaving high school, he worked as a chef for about eight years. He became involved in welfare work through volunteering; became a Lifeline volunteer; became involved in a support group called Dads in Distress; founded a Men for Life Group; worked as a casual for the Probation and Parole Office, where he ran anger management courses and domestic violence courses. He commenced full-time employment with the respondent on 29 November 2012, initially as a Support Worker and eventually, as an Accommodation Team Leader.
147. In relation to return to work plans and any occupational rehabilitation services that have been provided, there is an initial assessment report by Beneco dated 6 November 2018 that pre-dates the period for determination and is of no assistance.¹¹⁵
148. Apart from the certificates referred to above, there is an absence of recent medical evidence.
149. Having regard to Mr Simister's evidentiary statements, the medical evidence as to his capacity, his age, skills, work experience and the other relevant factors to be considered in accordance with section 32A of the 1987 Act, I am satisfied on the balance of probabilities and I find that he had no current work capacity within the meaning of section 32A of the 1987 Act during the period 4 February 2019 to 25 July 2019.

¹¹⁴ ARD at page 249

¹¹⁵ ARD at page 246-251

150. On 26 July 2019, Mr Simister commenced employment with the NSW Department of Education as a Teacher's Aide where he works up to 20 hours per week at the Sanctuary Point Public School.¹¹⁶ He has demonstrated a capacity for work in suitable employment. Mr Simister's Department of Education payslips disclosed an hourly rate of \$32.29,¹¹⁷ which amounts to \$645.80 per week for a 20 hour week and \$807.25 per week for a 25 hour week.
151. On 16 July 2019, Dr Bertucen opined that full-time employment at that stage was desirable but may not be possible within the next six to nine months. Dr Hettige's most recent certificate certified Mr Simister as having capacity for some type of work from 10 December 2019 to 10 February 2020 five hours per day, five days per week.
152. Doing the best I can on the available evidence, I find that Mr Simister had a current work capacity within the meaning of section 32A of the 1987 Act as a Teacher's Aide for 20 hours per week at \$645.80 per week from 26 July 2019 to 9 December 2019 and for 25 hours per week at \$807.25 per week from 10 December 2019 to 10 February 2020. I find that Mr Simister was able to return to full time employment (not in the welfare industry), where he would have been able to earn the equivalent or more than he was earning with the respondent from 11 February 2020. In this regard, I take into account Dr Bertucen's opinion that Mr Simister could return to full time employment in six to nine months from 16 July 2019; 11 February 2020 being some seven months from the date of the consultation with Dr Bertucen and coinciding with the date on Dr Hettige's most recent certificate of capacity.
153. The PIAWE was agreed at \$1,494.99. This amount does not exceed the statutory maximum referred to in section 34 of the 1987 Act. The PIAWE is indexed every six months in accordance with section 82A of the 1987 Act.
154. The parties did not make any submissions in relation to any adjustment to be made in relation to pecuniary benefits (overtime and shift allowance) after 52 weeks in accordance with section 44C(1)(b) of the 1987 Act. There is no evidence before me of any non-pecuniary benefits.
155. Mr Simister's weekly benefits compensation was terminated by the respondent on 3 February 2019, during the second entitlement period. The second entitlement period is that of 117 weeks, postdating the initial 13 weeks. Weekly payments during the second entitlement period is governed by section 37 of the 1987 Act.
156. In accordance with section 37(1) of the 1987 Act, Mr Simister's entitlement to weekly compensation during the second entitlement period from 4 February 2019 to 25 July 2019 is as follows:
- PIAWE x 80% minus any deductible amount (pecuniary benefits):
- (\$1,494.99 x 80%) - \$0 = \$1,195.99 per week.
157. In accordance with section 37(2) of the 1987 Act, Mr Simister's entitlement to weekly compensation during the second entitlement period from 26 July 2019 to 9 December 2019 is as follows:
- PIAWE x 95% - current weekly earnings + any deductible amount (pecuniary benefits):
- (\$1,494.99 x 95%) = \$1,420.24 - (\$645.80 + \$0) = \$774.44 per week.

¹¹⁶ ARD at page 317

¹¹⁷ Applicant's Application to Admit Late Documents dated 23 January 2020 at pages 32-34

158. In accordance with section 37(2) of the 1987 Act, Mr Simister's entitlement to weekly compensation during the second entitlement period from 10 December 2019 to 10 February 2020 is as follows:

PIAWE x 95% - current weekly earnings + any deductible amount (pecuniary benefits):

$(\$1,494.99 \times 95\%) = \$1,420.24 - (\$807.25 + \$0) = \$612.99$ per week.

159. Mr Simister will be entitled to an award in accordance with the above calculations and the respondent will need to make the appropriate adjustments pursuant to sections 82A and 44C(1)(b) of the 1987 Act. I grant the parties liberty to apply within 14 days in relation to the calculation of weekly benefits.

Mr Simister's entitlement to section 60 expenses

160. Section 59 of the 1987 Act provides definitions of certain medical and related treatment, services and rehabilitation.

161. Section 60(1) of the 1987 Act relevantly provides that, if as a result of an injury received by a worker, it is reasonably necessary that any medical or related treatment, hospital treatment, ambulance service or workplace rehabilitation service be provided, then a worker's employer is liable to pay the cost of such treatment or service. In addition, the employer is liable to pay the related travel expenses specified in section 60(2) of the 1987 Act.

162. On the evidence and having received an award in his favour, Mr Simister is entitled to recover the cost of reasonably necessary medical, hospital and related expenses pursuant to section 60 of the 1987 Act and I make a general order in this regard.

CONCLUSION

163. Mr Simister suffered a primary psychological injury in the course of his employment with the respondent on 10 September 2018 within the meaning of section 4(a) of the 1987 Act, to which employment was a substantial contributing factor within the meaning of section 9A of the 1987 Act.

164. The respondent has not discharged its onus of establishing on the balance of probabilities that the disciplinary "action" was reasonable within the meaning of section 11A(1) of the 1987 Act and has not made out its defence in this regard.

165. Mr Simister had no current work capacity within the meaning of section 32A of the 1987 Act during the period 4 February 2019 to 25 July 2019.

166. Mr Simister had a current work capacity within the meaning of section 32A of the 1987 Act as a Teacher's Aide for 20 hours per week at \$672.80 per week from 26 July 2019 to 9 December 2019.

167. Mr Simister had a current work capacity within the meaning of section 32A of the 1987 Act as a Teacher's Aide for 25 hours per week at \$807.25 per week from 10 December 2019 to 10 February 2020.

168. Mr Simister was able to return to full time employment (not in the welfare industry), where he would have been able to earn the equivalent or more than he was earning with the respondent from 11 February 2020.

169. The respondent is to pay Mr Simister weekly compensation in respect of the primary psychological injury on 10 September 2018 as follows:

- (a) \$1,195.99 per week from 4 February 2019 to 25 July 2019 under section 37(1) of the 1987 Act.
- (b) \$774.44 per week from 26 July 2019 to 9 December 2019 under section 37(2) of the 1987 Act.
- (c) \$612.99 per week from 10 December 2019 to 10 February 2020 under section 37(2) of the 1987 Act.
- (d) Liberty to apply within 14 days in relation to the calculation of weekly benefits.

170. The respondent is to pay Mr Simister's reasonably necessary medical and related expenses as a result of the primary psychological injury on 10 September 2018 under section 60 of the 1987 Act.

