

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 6065/19
Applicant: Edie-Lee Wilkinson
Respondent: State of New South Wales
Date of Determination: 17 February 2020
Citation: [2020] NSWCC 47

The Commission determines:

1. Award for the respondent.

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

Rachel Homan
Arbitrator

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

A Reynolds

Antony Reynolds
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Edie-Lee Wilkinson (the applicant) was employed by the State of New South Wales (the respondent) as a civilian Crime Scene Officer for the NSW Police Force. The applicant claims to have sustained a psychological injury as a result of allegations of misconduct made against her by her employer which were wrong.
2. The applicant's claim for compensation for the injury was disputed by a notice issued pursuant to s 78 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) on 4 March 2019.
3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 20 November 2019. The applicant sought weekly benefits from 15 February 2019 to 5 August 2019.

PROCEDURE BEFORE THE COMMISSION

4. The parties appeared for conciliation conference and arbitration hearing on 11 February 2020. The applicant was represented by Mr Richard Brennan. The respondent was represented by Mr Misha Hammond of counsel, instructed by Ms Angellina Psirakis.
5. During the conciliation conference, leave was granted to the applicant to amend the ARD to include a general claim for medical expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act). The parties agreed that a general order for s 60 expenses would be appropriate in the event of favourable determinations for the applicant.
6. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

ISSUES FOR DETERMINATION

7. The parties agree that the following issues remain in dispute:
 - (a) Whether the applicant sustained a psychological injury pursuant to s 4 of the 1987 Act;
 - (b) Whether employment was a substantial contributing factor to the injury pursuant to s 9A of the 1987 Act;
 - (c) Whether the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to discipline or performance appraisal pursuant to s 11A(1) of the 1987 Act;
 - (d) Extent and quantification of any incapacity resulting from injury; and
 - (e) Entitlement to s 60 expenses.

EVIDENCE

Documentary Evidence

8. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) ARD and attached documents;
 - (b) Reply and attached documents;
 - (c) Documents attached to an Application to Admit Late Documents filed by the respondent on 4 February 2020.
9. Neither party applied to adduce oral evidence or cross-examine any witness.

Applicant's evidence

10. The applicant's evidence is set out in a written statement dated 18 October 2019.
11. The applicant stated that she and her former husband had been involved in a long-standing family law feud. The applicant's husband made an application for an Apprehended Domestic Violence Order (ADVO) dated 23 January 2019. Approximately one week later, the applicant was served with paperwork by her employer restricting her from examining crime scenes or exhibits which involved firearms. The applicant denied that this restriction had any effect on her and said she kept working without time off or seeing a doctor.
12. On 13 February 2019, the applicant was given paperwork addressed to her which set out two allegations of misconduct. The applicant said the allegations were both factually incorrect and had been made against her by her employer. The applicant felt the allegations had been partially invented in two respects:
 - (a) it was alleged that the applicant or somebody else broke into her husband's house yet this was not set out in the application for the ADVO;
 - (b) it was alleged that NSW Police had issued an interim ADVO naming the applicant as defendant but at the relevant time no interim orders were in place.
13. The applicant said she later received a letter from her employer advising that a finding had been made that the applicant had not engaged in misconduct and no disciplinary action resulted.

Application for Apprehended Domestic Violence Order

14. Attached to the ARD is a document titled "Application for Apprehended Domestic Violence Order" (the ADVO application). The document indicates that the application was made by Sgt Craig Gilby and identifies the person to be protected by the order as Trevor Wilkinson. The applicant is identified as the person against whom the order was sought. The applicant was directed to attend Broken Hill Local Court on 15 February 2019 at 9:30 am.
15. The documents set out reasons for making the application, which indicated that the applicant and Mr Wilkinson moved to Broken Hill in January 2015 and soon afterwards their relationship began to sour. The applicant and Mr Wilkinson separated in around September 2015.

16. On 6 June 2018, Mr Wilkinson had their daughter Alice over at his house for her birthday. The applicant's son from a previous relationship, Lucas, was in attendance. At the time, the applicant had an AVO out against Lucas for her protection. When told of Lucas's attendance at Mr Wilkinson's house, the applicant became enraged and went to Mr Wilkinson's home and began angrily banging on his door, requesting to be let in. After asking the applicant three times to leave, Mr Wilkinson called the police. The police contacted the applicant by phone and asked her to leave, which she did.
17. Over the next few weeks, Mr Wilkinson received letters from the applicant in NSW Police envelopes containing general gripes about him not caring for their daughter properly. Mr Wilkinson's mother also received one such letter.
18. At the start of December 2018, Mr Wilkinson received a phone call from the applicant about their daughter's health. The conversation became heated and towards the end of the conversation, the applicant said, "I can get you whether I'm in town or not", then hung up.
19. At about 9:30pm on 19 January 2019, Mr Wilkinson locked and secured his premises and went out for the night. When he returned the next day, Mr Wilkinson found a name badge reading "NSW Police Force, Edie-Lee Wilkinson" on the kitchen table. Mr Wilkinson took the badge to the police station and reported the matter. Mr Wilkinson believed that the badge was placed in his house as a form of intimidation. The applicant did not have keys or consent to enter Mr Wilkinson's house. Mr Wilkinson was growing increasingly concerned about the applicant's behaviour and held fears for his safety.

Interim Apprehended Domestic Violence Order

20. Amongst the materials filed is an Interim Apprehended Domestic Violence Order dated 8 July 2019 relating to the application made by Sgt Craig Gilby referred to above. The applicant was directed to appear before Broken Hill Local Court on 14 February 2020.

Response to the ADVO application

21. The applicant wrote to her Local Area Commander, responding to the ADVO application in a letter dated 8 February 2019. The applicant asked that the application be withdrawn.
22. The applicant said that she and Mr Wilkinson moved to Broken Hill in 2013 and had an extremely strained relationship thereafter. Mr Wilkinson had been aggressive and bullied her son and at one point threatened him. After this time, the applicant decided the relationship was over. The applicant began to pack belongings and store them in a friend's shed. The applicant was fearful of Mr Wilkinson's behaviour and threats to take off with their daughter. The applicant left in secret and removed as many of her belongings as she could but left some of her personal belongings behind. The applicant said it was possible that she had left one of her police name badges behind as she had been washing her uniform at home and the name badges were attached.
23. The applicant described an incident when Mr Wilkinson became aggressive during a supervised visit with their daughter and difficulties in relation to an application for parenting orders.
24. The applicant stated that on her sixth birthday, her daughter spent time with Mr Wilkinson. Alice told the applicant that her son had been at Mr Wilkinson's house while she was there. At the time, the applicant's son had been charged with assaulting the applicant and an AVO had been taken out against him. The applicant tried to message and call Mr Wilkinson as she was not sure if he was aware of the AVO. The applicant then drove to Mr Wilkinson's house and calmly knocked on the door once. Mr Wilkinson answered the door and told her to go home. He proceeded to call the police who then called the applicant and advised her that it would be best if she left. The applicant left immediately. The applicant denied banging three times on the door or angrily demanding to be allowed inside.

25. The applicant said she had attempted to discuss her daughter's medical issues with Mr Wilkinson by text message, email, letters and in person. Mr Wilkinson continually refused to follow the doctor's orders. Mr Wilkinson refused to attend mediation through Centacare to discuss the issues.
26. The applicant said she typed a personal letter and sent a duplicate of the same letter to Sue Wilkinson in regard to the welfare of her daughter. The letter was not on official letterhead, did not have her position within the police force noted. The letter showed the applicant's personal contact details and was not signed in an official capacity. The applicant used an envelope from work as she did not have an envelope of her own handy at the time. The applicant sent one letter on one day only and not several letters over several weeks. The applicant said she was forced to resort to letters as a way of communication as Mr Wilkinson refused to answer phone calls or text messages and had refused mediation.
27. The applicant said she had printed a copy of her phone records for November and December 2018. This showed only a few calls to Mr Wilkinson ranging from two seconds to one minute and eight seconds in duration. No calls were made in early December. The applicant denied that the phone call described in the ADVO application took place. The applicant denied threatening Mr Wilkinson and said the phone calls were so short that it was impossible for a heated discussion to manifest.
28. The applicant said she was in Glenelg, South Australia on holidays from 18 January 2019 to 25 January 2019 so could not have broken into Mr Wilkinson's house on 19 January 2019. The applicant attached bank documents showing purchases in Glenelg South Australia during this period.
29. The applicant said,

"These allegations have come about from complaints from a vindictive ex-husband who is attempting to destroy my reputation, work ethic and integrity. I am extremely distressed by these allegations which have compounded my feelings of anxiety/depression, anguish and despair."

Interim Risk Management Plan

30. The applicant and her supervisors signed an Interim Risk Management Plan, dated 29 January 2019, on 31 January 2019.
31. The plan indicates that the applicant was the subject of an allegation of misconduct and AVO application. The plan acknowledged that the proceedings had not been finalised and were currently allegations only. The plan stated,

"Due to the nature of the allegations, it is considered necessary to implement strategies in order to minimise the risks associated. The strategies, as outlined in this plan, are interim risk management in nature and do not represent final management action."
32. The plan indicates that for the duration of the plan the applicant would be assigned a monitoring officer and that meetings would be initiated on a fortnightly basis. The applicant would not be permitted to attend any crime scenes involving the processing of firearm exhibits. The applicant would be monitored over the period of the plan by all supervisors/managers within the Crime Scene Services Branch to ensure that the applicant's level of conduct was appropriate.
33. The plan indicated that the strategy was entirely voluntary and the applicant was aware of and provided with appropriate support services and networks.

Allegations of Misconduct

34. Attached to the ARD is an undated letter addressed to the applicant from NSW Police. The letter states,

*"I have received information which indicates that you may have engaged in misconduct. Accordingly, I have decided to proceed with this matter as an allegation of misconduct pursuant to Part 6 of the *Government Sector Employment (NSW Police Force) Rules 2017*. As required by that legislation, I have particularised the allegations below for your information.*

Allegation 1:

It is alleged that between 9:30 pm, Saturday, 19 January 2019 and 4:30 pm, Sunday, 20 January 2019, you or someone else (at your request) broke into the home address of Mr Trevor Wilkinson... It is also alleged while you or someone else were inside the premises, a NSWPF nameplate in the name of 'Edie-Lee Wilkinson' was placed on the kitchen table to intimidate Mr Trevor Wilkinson.

Allegation 2:

It is alleged that your behaviour and actions towards Mr Trevor Wilkinson has caused Mr Trevor Wilkinson to feel intimidated and to fear for his safety. Subsequently, police have issued an interim apprehended domestic violence order (ADVO) naming you as the defendant.

Your actions include:

- In April 2018, you sent letters to Mr Trevor Wilkinson and to his mother regarding childcare issues in NSWPF envelopes and sent an email to Mr Trevor Wilkinson using your NSWPF email address...;*
- On 6 June 2018, you attended the home address of Mr Trevor Wilkinson uninvited and caused a disturbance. You left the location after being spoken to by police (by phone).*
- In September 2018, you made enquiries regarding obtaining a firearms licence and received an application form for the same.*
- In early December 2018, it is alleged that during a telephone conversation with Mr Trevor Wilkinson, you stated in words to the effect of 'I can get to you whether I am in town or not' which caused Mr Trevor Wilkinson to 'worry'."*

35. The letter advised the applicant that if proven, her conduct would constitute a serious breach of the NSWPF Code of Conduct & Ethics and breach the *Crimes Act 1900*. The applicant was invited to make a statement in relation to the allegations which would be considered before a determination was made as to what action would be taken. The applicant was advised that if it was ultimately found that she had engaged in misconduct, action could be taken under s 69(4) of the *Government Sector Employment Act 2013*. The applicant was requested to provide any statement within two weeks from receipt of the letter.

Response to allegations of misconduct

36. A written response to the allegations of misconduct was provided on behalf of the applicant by Ms Susan Emery of the Public Service Association on 22 February 2019.
37. The letter stated that the applicant was being subjected to a second disciplinary process as result of her ex partner's ongoing vexatious complaints. The present allegations related to an ADVO summons issued by the NSW Police on behalf of Mr Wilkinson. The proceedings were next listed for directions on 29 March 2019 in Broken Hill Local Court. The applicant had applied to the Crown Prosecutor for withdrawal of the AVO on the grounds that it was vexatious. The applicant refuted the allegations made by Mr Wilkinson and had provided evidence that the allegations were untrue.

38. Ms Emery stated that the PSA submitted that the allegations of misconduct were vexatious and could not be sustained and should therefore be dismissed. Ms Emery stated that Mr Wilkinson had engaged in an ongoing campaign of harassment, including repeated legal processes that was interfering with the applicant's employment and causing her professional and financial distress. The ADVO process was commenced by NSW Police on behalf of Mr Wilkinson without speaking to the applicant.
39. Ms Emery stated that the PSA was concerned that a disciplinary process based upon the vexatious ADVO was an extension of the harassment by her ex-partner and the NSW Police were perhaps unwittingly participating in the harassment, causing Ms Wilkinson psychological harm.
40. Ms Emery expressed concern that if the ADVO was not withdrawn, the disciplinary process may go on for another six months. This would deny the applicant procedural fairness. The applicant's capacity to do her work was already interfered with. An interim risk assessment had been conducted and Ms Wilkinson was prevented from attending any crime scenes involving firearm exhibits.
41. Ms Emery requested that the Professional Standards Committee discontinue the misconduct investigation and the risk assessment in place.
42. The applicant provided a further response to the allegations by email dated 25 February 2019. The applicant denied ever entering the house of Mr Wilkinson. The applicant said she was in Adelaide at the time the unreported incident occurred. Mr Wilkinson had access to the applicant's name badges when they lived together. When the applicant moved out of her home, she did not take all of her belongings.
43. The applicant denied that interim ADVO orders were in place.
44. The applicant said the envelope issue had previously been addressed. The applicant agreed that she did attend Mr Wilkinson's home to discuss an important issue regarding their daughter. Mr Wilkinson told the applicant to go home then immediately called the police who contacted the applicant and advised her that it would be best if she went home. The applicant did this and did not continually bang on the door or demand to be allowed in. The applicant did not cause a disturbance.
45. The applicant agreed she did make an enquiry in September 2018 to apply for a firearms licence for recreational purposes. The applicant said she lived in a remote/regional area and this was a common recreational activity. The applicant had not filled out the forms or attended a club to fulfil the requirements of the application.
46. The applicant denied that the phone call alleged in the ADVO application ever took place. The applicant provided phone records for the timeframe in question.
47. The applicant denied there had been any report of a break and enter. The applicant stated that the allegations were factually incorrect and based on vexatious complaints for which no investigation had been conducted.

Allegations of misconduct – final decision

48. An undated letter to the applicant titled "Allegations of Misconduct – Final Decision" refers to previous correspondence dated 7 February 2019 inviting the applicant to make a statement concerning allegations of misconduct against her.

49. The letter advised the applicant that after careful consideration of her statement and all other relevant information a finding had been made that the applicant had not engaged in misconduct in accordance with rule 46(1)(b) of the *Government Sector Employment (NSW Police Force) Rules 2017* and the allegations of misconduct were not sustainable.
50. The author considered it appropriate that the applicant's Commander provide her with advice and guidance, by reminding her of her obligations under the NSW Police Force Code of Conduct & Ethics.
51. The applicant was advised that the matter had not resulted in disciplinary action against her and no record of the complaint would be made on her e-Personnel file.
52. The applicant was reminded that assistance could be provided to her through the Employee Assistance Program.

Incident Notification Form

53. An incident notification form prepared by the applicant's supervisor, Neil Pearse, on 25 February 2019 indicates that the applicant sustained a psychological injury on 15 February 2019 at 2pm. The incident was described in the following terms,

"As a result of an interim risk management plan, CSO WILKINSON is currently restricted from examining crime scenes or exhibits which involve firearms following the service of a non-urgent AVO application upon her. CSO WILKINSON is now experiencing anxiety and panic attacks as a result of this restriction."

WorkCover Certificates

54. The first WorkCover certificate of capacity in evidence is dated 21 February 2019. The certificate gives a patient stated date of injury of 7 February 2019 and states that the applicant was experiencing anxiety with depression. The condition was said to be related to work because,

"... her anxiety and panic attacks started when she was restricted by the workplace after an allegation of misconduct."

55. The applicant was certified as having no current work capacity for four weeks from 15 February 2019. The applicant continued to be certified as having no current capacity until 26 April 2019.
56. In a certificate issued on 26 April 2019, the patient stated date of injury was amended to 15 February 2019. The applicant was certified as having no current work capacity until 29 April 2019. Thereafter the applicant was certified as having capacity as per her roster. The date of injury reverted to 7 February 2019.

Evidence from the applicant's treating practitioners

57. Clinical records produced by the general practice attended by the applicant indicates that she was prescribed Zoloft and reported psychological symptoms, including anxiety, from June 2014 onwards. A mental health care plan review was conducted in December 2014. The applicant reported stress relating to a court case and separation from her husband.
58. The applicant's Zoloft prescription was increased in May 2017.

59. Depression and anxiety symptoms were discussed on 15 June 2018 and a referral made to a psychiatrist, Dr Darren Cowley. A report from Dr Cowley dated in September 2018 indicates that the applicant had been seeing a police psychologist approximately every three months and had consulted another psychologist in relation to behavioural issues she was experiencing with her son. The applicant reported a history of depressive episodes since her early 20s. The applicant estimated that she had been “significantly depressed for 50% of the past 20 years”. There was a strong family history of mental illness. The applicant had reported difficulties associated with a blackmailing incident, issues with her ex-husband and difficulties with her mother.

60. On 24 August 2018, the clinical notes stated:

“here bec her ex-husband has made a complaint that is work related
--> she is upset and crying
--> 10 days off normal leave
--> brief counselling
--> she is on tract, she has called the union and work as well and wile she is very worried about loosing her job i have mirrored that there is a chance of keeping her job
brief counselling [sic]”

61. On 15 February 2019, the following was recorded:

“here for ff up as she has been having issues at work that is related to her es-husband filling charges against her and the workplace not wanting to be said to be bias so she is now under observation, has an avo and she is requesting med cert to be off work. i discussed the pros and cons and she is saying her work is affected and she is concerned about making a mistake at work
--> she feels she is anxious and having panic attacks coming to work.
--> shortness of breath, palpittaions and tears uncontrolled and light headed she sributes to fast breasting. nauseated and lasting for a few minutes.
She was observed having panic attacks at work.
i encouraged her to have counselling at work urgently untill she can be seen by Fiona Burrows the psychologist.
-- > Edie will ring today brief counselling done plan is for counselling and off work and review in 2 weeks
2. she has adjusted her somac and is now on 20mg daily [sic]”

62. On 21 February 2019 it was noted:

“patient is back to do a work cover claim on the event that happend at work,
-- the contention is that teh anxiety and panic attacks she has enrout to work and on arrival stems from the restriction imposed by the workplace after the allegation of misconduct. She is saying that there is no due process as she was immediately restricted without investigation needs a ref for psychiatry review [sic]”

63. Psychological symptoms and treatment were discussed at a number of consultations in the period that followed. On 13 May 2019 the clinical notes stated:

“Presents for review of depression and work cover documentation
- went back to work 4 days ago
- mood described as agitated, nervous, labile, stressed, teary since returning
- feels like her work is being scrutinized and that the staff at the police station are against her - told her work that she would like to be exempt from being on call for the time being to improve her sleep patterns, and in return received the threat that if she cannot do on call work, then they will put her on afternoon shifts (which finish at 2am)
- cannot concentrate

- sleep is ok
- appetitie and weight has been stable
- Is working today and does not want to go back to work
- no suicidal ideation
- is currently appealing work cover decicion. Needs reports from Dr. Maher and Dr. Mel
- Has been taking Duloxetine for just over 5 weeks. as starting to feel better before going back to work
- she spoke with psychologist at work who advised her that the best course of action is to leave her job. She is in agreement as she does not see things getting better at work. Just needs to find a suitable job to move to [sic]"

64. Consultant psychiatrist, Dr Kavita Seth, prepared a report for the applicant's general practitioner, Dr Melanie Mateo on 20 March 2019. Dr Seth made a diagnosis of relapse of depression and anxiety most likely due to workplace allegations. The applicant's current functioning was described as poor and the applicant was unable to work.
65. A psychologist, Ms Fiona Walsh, prepared a report for Dr Mateo on 4 April 2019. The applicant presented with symptomology indicative of depression and anxiety including mood disturbance and disturbance in energy and motivation. The applicant reported significant anxiety reactive to workplace triggers.
66. On 29 May 2019, Dr Mateo prepared a report in response to questions posed by the applicant's solicitors on 11 April 2019. The report gives a history of injury as follows:
- "As per record and after clarifying with Edie: the patient's ex-husband accused her of entering his house and took out an AVO against Edie in the last week of jan 2019. As a result of this her workplace has restricting capacity to carry firearms. Subsequently she received a letter of misconduct saying there will be an internal investigation and her capacity to work has been further restricted. She was off for a few days after receiving the letter and on return on the 15th feb she experienced symptoms of panic attacks on her way to and on arriving at work."
67. Dr Mateo was asked whether the condition resulted from receiving the letter containing allegations of misconduct rather than the previous restriction in relation to her exposure to firearms. Dr Mateo attributed the symptoms to going to work after receiving the letter of misconduct. After the AVO application resulting in the firearm restriction, the applicant was still working with no anxiety.
68. Dr Mateo considered that the applicant's chronic anxiety had been exacerbated, stating:
- "The condition is an exacerbation of Edie's disease and the letter of misconduct is the contributing factor/cause of the exacerbation.
- ...
- If she did not receive a letter of misconduct and the subsequent internal investigation the possibility of an exacerbation would be less as she was coping well with the AVO."

Respondent's submissions

69. Mr Hammond submitted that the applicant bore the onus of establishing that she sustained an injury to which employment was the main contributing factor or a substantial contributor factor.

70. The applicant's evidence indicated that an application for an ADVO was made by the police in relation to private matters unrelated to work. The applicant's response to the ADVO application indicated that she had become "extremely distressed" by the allegations. This suggested that the genesis of any psychological condition was in the applicant's relationship difficulties or other private matters rather than anything related to her employment.
71. Mr Hammond submitted that I would have difficulty placing weight on the report of Dr Mateo on the basis that it did not deal sufficiently with the applicant's pre-existing psychological condition. Mr Hammond noted that the clinical records indicated that Zoloft had been prescribed since 2014 and recorded the presence of psychological symptoms pre-dating February 2019. Mr Hammond also took me to the report of Dr Cowley dated in September 2018.
72. Mr Hammond submitted that there was insufficient evidence that any incapacity experienced by the applicant during the period of weekly benefits claimed related to a work injury rather than a pre-existing condition unrelated to employment.
73. In the event of a favourable determination for the applicant on the issue of injury, Mr Hammond relied on the defence in s 11A(1) of the 1987 Act. Although it was conceded that the respondent had not qualified an independent medical expert, Mr Hammond submitted that there was sufficient evidence that the applicant's condition was wholly or predominantly caused by reasonable action with respect to discipline.
74. The applicant's duties as a crime scene officer involved exposure to exhibits including firearms. Having regard to the nature of the complaints set out in the ADVO application it was incumbent upon the respondent to take action to investigate the allegations and take steps to ensure the safety of members of the public.

Applicant's submissions

75. Mr Brennan submitted that the applicant's injury had nothing to do with the ADVO application or the restriction of the applicant's access to firearms. Rather, the applicant's injury was caused by the employer's action with regard to the allegations of misconduct which were factually wrong.
76. Mr Brennan noted that the WorkCover certificate dated 21 February 2019 indicated that the applicant was experiencing anxiety and panic attacks caused by the work allegations of misconduct.
77. Mr Brennan submitted that Dr Mateo was fully aware of the applicant's pre-existing psychological history and had given an opinion that the injury involved an exacerbation of the applicant's chronic anxiety, consistent with an injury under s 4(b)(ii) of the 1987 Act. Mr Brennan said it should be inferred that Dr Mateo was aware of the pre-existing condition at the time she prepared the certificate and her report as she had access to the clinical records.
78. Mr Brennan submitted that the wording of the dispute notice issued by the respondent appeared to indicate an admission as to injury, which could not be resiled from.
79. Mr Brennan noted that the applicant's evidence was that she had received the letter informing her of the allegations of misconduct on 13 February 2019. The cause of the applicant's psychological injury was not the ADVO application but rather the allegations of misconduct made by the respondent. Those allegations were factually incorrect in so far as there were no interim orders in place at the relevant time and it had not been alleged that the applicant had broken into Mr Wilkinson's home.

80. Mr Brennan submitted that the clinical notes showed that there were no consultations in relation to psychological symptoms until 15 February 2019, being two days after the applicant received the allegations of misconduct and many days after the ADVO application was served upon her. Mr Brennan noted that the incident notification form was not completed by the applicant but by her supervisor Mr Pearse.
81. Mr Brennan said the applicant was accused of misconduct not set out in the ADVO application. It had later been acknowledged that the allegations were factually incorrect and Mr Brennan submitted that the respondent's action was far from reasonable. The allegations were not only incorrect, the respondent had been negligent in making them in the circumstances.
82. Mr Brennan submitted that there was no medical dispute that there was an injury. The applicant's general practitioners and psychiatrist had reached a consistent opinion on diagnosis.
83. Mr Brennan submitted that it was not open to the respondent to rely on the defence in s 11A(1) of the 1987 Act in the absence of a medical opinion consistently with *Hamad v Q Catering Ltd*¹.
84. With regard to incapacity, Mr Brennan said the applicant's evidence, the general practitioners' reports and the WorkCover certificates all clearly showed there was a period of no current work capacity, followed by period of capacity to perform suitable duties consistent with the applicant's wages schedule.

Submissions in reply

85. Mr Hammond said the s 78 notice ought to be read as a whole. It was clear there was no admission with respect to injury and it was common practice for an insurer to rely on alternative disputes in the event of a finding of injury.
86. Mr Hammond said the allegations of misconduct were taken from the ADVO application. Whether the allegations were true or not was neither here nor there. The action taken by the respondent in the circumstances was reasonable.

FINDINGS AND REASONS

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

"In this Act:

injury:

- (a) means personal injury arising out of or in the course of employment,
- (b) includes a disease injury, which means:
 - (i) a disease that is contracted by a worker in the course of employment but only if the employment was the main contributing factor to contracting the disease, and

¹ [2017] NSWCCPD 6; BC201701872.

- (ii) the aggravation, acceleration, exacerbation or deterioration in the course of employment of any disease, but only if the employment was the main contributing factor to the aggravation, acceleration, exacerbation or deterioration of the disease”

88. “Psychological injury” is further defined in s 11A(3) of the 1987 Act:

- “(3) A psychological injury is an injury (as defined in s 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system.”

89. A worker who receives a psychological injury which meets the statutory definitions will not, however, be entitled to compensation if the defence in s 11(A)(1) of the 1987 Act is made out:

- “(1) No compensation is payable under this Act in respect of an injury that is a psychological injury if the injury was wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to transfer, demotion, promotion, performance appraisal, discipline, retrenchment or dismissal of workers or provision of employment benefits to workers.”

90. Subsection 11(A)(1) is a disentitling provision and an employer who wishes to rely upon it carries the onus of establishing that defence².

91. The requirements of s 11A(1) were considered in *Manly Pacific International Hotel v Doyle*³ where Fitzgerald JA (Mason P agreeing) at [4] said:

- “...the Compensation Court was required to decide whether (i) the whole or predominant cause of Mr Doyle's psychological injury was the appellant's action with respect to Mr Doyle's transfer from one position to another, and, (ii) if so, whether the appellant's action with respect to Mr Doyle's transfer was reasonable.”

92. In considering the question of causation, Snell DP in *Hamad v Q Catering Ltd*⁴ found that in many cases there will need to be medical evidence to establish that the employer's action was the “whole or predominant cause” of the injury:

- “The extent to which aspects of the appellant's history contributed to causing the psychological injury was not, in the circumstances, something which could be decided in the absence of medical evidence. There may be cases in which causation of a psychological injury can be established without specific medical evidence, for example where there is a single instance of major psychological trauma, with no other competing factors. The need for medical evidence, dealing with the causation issue in s 11A(1) of the 1987 Act, will depend on the facts and circumstances of the individual case. In the current case, as in most, there are a number of potentially causative factors raised in the appellant's statement and the medical histories. Proof of whether those factors, which potentially provide a defence under s 11A(1), were the whole or predominant cause of the psychological injury, required medical evidence on that topic. The extent of any causal contribution, from matters not constituting actions or proposed actions by the respondent with respect to discipline, could not be resolved on the basis of the Arbitrator's common knowledge and experience.”

² *Pirie v Franklins Ltd* [2001] NSWCC 167; *Department of Education and Training v Sinclair* [2005] NSWCA 465.

³ [1999] NSWCA 465; 19 NSWCCR 181.

⁴ [2017] NSWCCPD 6; BC201701872.

93. The test of reasonableness is an objective one⁵. In *Commissioner of Police v Minehan*⁶ Foster AJA (Sheller and Santow JJA agreeing) cited with approval a passage from an unreported decision of Geraghty J in *Irwin v Director-General of School Education*⁷:

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

94. In *Northern New South Wales Local Health Network v Heggie*⁸(Heggie) Sackville AJA considered a number of authorities dealing with s 11A(1) and distilled the following propositions:

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

- (i) A broad view is to be taken of the expression ‘action with respect to discipline’. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation.
- (ii) Nonetheless, for s 11A(1) to apply, the psychological injury must be wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer.
- (iii) An employer bears the burden of proving that the action with respect to discipline was reasonable.
- (iv) The test of reasonableness is objective. It is not enough that the employer believed in good faith that the action with respect to discipline that caused psychological injury was reasonable. Nor is it necessarily enough that the employer believed that it was compelled to act as it did in the interests of discipline.
- (v) Where the psychological injury sustained by the worker is wholly or predominantly caused by action with respect to discipline taken by the employer, it is the reasonableness of that action that must be assessed. Thus, for example, if an employee is suspended on full pay and suspension causes the relevant psychological injury, it is the reasonableness of the suspension that must be assessed, not the reasonableness of other disciplinary action taken by the employer that is not causally related to the psychological injury.
- (vi) The assessment of reasonableness should take into account the rights of the employee, but the extent to which these rights are to be given weight in a particular case depends on the circumstances.
- (vii) If an Arbitrator does not apply a wrong test, his or her decision that an action with respect to discipline is or is not reasonable is one of fact.”

⁵ *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138.

⁶ [2003] NSWCA 239.

⁷ (unreported 18 June 1998)

⁸ (2013) 12 DDCR 95; [2013] NSWCA 255; BC201311746.

Injury and causation

95. The issue of whether the applicant had sustained an injury in accordance with s 4 of the 1987 Act was plainly disputed by the respondent in the dispute notice issued pursuant to s 78 of the 1998 Act on 4 March 2019. The first reason for disputing liability was identified on page 2 of that notice as,

“You did not sustain an injury arising out of or in the course of your employment with NSW Police Force as required under section 4 of the *Workers Compensation Act 1987* (WC Act).”

96. I do not accept the submission that the identification of a further issue in dispute in the following terms constitutes an admission that there was an injury from which the respondent is estopped or otherwise prevented from resiling:

“Your injury is a psychological injury caused wholly or predominantly by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to performance appraisal and/or discipline and is therefore not compensable under section 11A of the *Workers Compensation Act 1987* (WC Act).”

97. I am satisfied, reading the dispute notice as a whole, that this was simply an alternative basis on which the claim was disputed, in the event the applicant were found to have sustained an “injury”. Nothing else in the dispute notice or the respondent’s handling of the claim suggests that the respondent accepted that an “injury” had occurred.

98. The evidence before me establishes that the applicant experienced psychological symptoms capable of diagnosis as a psychological disorder, on and after 15 February 2019. The applicant’s psychiatrist, Dr Seth, considered the symptoms warranted a diagnosis of depression and anxiety. The applicant’s psychologist, Ms Walsh, reached the same conclusion.

99. The clinical records in evidence confirm that the applicant had experienced psychological symptoms previously. In fact, the applicant had a long-standing history of psychological symptoms and treatment prior to 15 February 2019. The clinical records show that the applicant’s symptoms increased from time to time, particularly in the context of difficulties in the applicant’s relationship with Mr Wilkinson. The evidence does suggest, however, that in the lead up to February 2019 the applicant had capacity for work and her symptoms were well-controlled.

100. I accept that the applicant experienced an increase or exacerbation of her psychological symptoms on or around 15 February 2019. Dr Mateo, who had access to the applicant’s clinical records, has indicated that there was an exacerbation of the applicant’s chronic anxiety at this time. Dr Mateo described this as an “exacerbation of a disease” consistently with s 4(b)(ii) of the 1987 Act.

101. For the applicant’s psychological condition to fall within the definition of “injury”, however, it must be causally related to her employment. For an injury under s 4(b)(ii), employment must be “the main contributing factor” to the aggravation, acceleration, exacerbation or deterioration of the disease.

102. The respondent made submissions at hearing suggesting that the applicant had not discharged the onus of establishing an injury under s 4, referring in particular to evidence that the applicant had been identified as defendant in an application for an ADVO in relation to matters of a private or personal nature which were unrelated to work. The applicant’s response to the ADVO application indicated that the allegations set out in the application had caused her to become extremely distressed.

103. It is the applicant's case, however, that it was not the ADVO application, her difficulties with Mr Wilkinson or even the imposition of the Interim Risk Management Plan in late January 2019 which caused her injury. The applicant relies specifically on the respondent's allegations of misconduct as set out in the correspondence which appears undated in the materials before me but which the applicant says she received on 13 February 2019. I note that subsequent correspondence suggests the letter in question was dated 7 February 2019.
104. It is fair to say that the applicant was faced with a range of challenging circumstances in the lead up to being presented with the correspondence alleging misconduct. Although I would have difficulty accepting that the allegations of misconduct by the respondent were the sole cause of an exacerbation of the applicant's psychological condition, the applicant's claim does receive support from the evidence of her treating practitioners.
105. The applicant has given evidence that she was served with the ADVO application on 23 January 2019. The applicant signed an Interim Risk Management Plan on 31 January 2019. The applicant responded to the ADVO application on 8 February 2019. Throughout this period, it appears the applicant continued to attend work and Dr Mateo says the applicant was doing so without symptoms of anxiety.
106. The clinical notes indicate that the applicant first consulted her general practitioner reporting new and increased psychological symptoms on 15 February 2019, being a date after the letter alleging misconduct had been given to her. The clinical notes of that date relate the symptoms to work. The notes indicate that the applicant's workplace did not want to appear biased and so had placed her under observation. The applicant's work was affected and she was concerned about making a mistake at work. The applicant was feeling anxious and having panic attacks when coming to work and had been observed having panic attacks at work.
107. The first WorkCover certificate was issued on 21 February 2019 and stated that the applicant's condition was related to work because her anxiety and panic attacks started when she was "restricted by the workplace after an allegation of misconduct". The clinical notes on that date related the anxiety and panic attacks to the "restriction imposed by the workplace after the allegation of misconduct". The applicant said there was no due process and she was immediately restricted without investigation.
108. Whilst these notes could be viewed as relating the applicant's condition to both the restrictions imposed under the Interim Risk Management Plan and the allegations of misconduct, Dr Mateo was specifically asked by the applicant's solicitor whether the condition resulted from receiving the letter containing allegations of misconduct rather than the previous restriction in relation to her exposure to firearms. Dr Mateo, in response, specifically attributed the symptoms to going to work after receiving the letter alleging misconduct. Dr Mateo said the applicant continued to work with no anxiety after the firearm restriction.
109. On the basis of Dr Mateo's evidence, I am prepared to accept that the letter alleging misconduct and the subsequent internal investigation were the main contributing factor to the aggravation or exacerbation of the applicant's psychological condition. No medical evidence to contradict Dr Mateo's opinion has been filed by the respondent.

Section 11A(1)

110. The respondent relies on the disentitling provision in s 11A(1) of the 1987 Act and carries the onus of establishing that defence⁹.

⁹ *Pirie v Franklins Ltd* [2001] NSWCC 167; *Department of Education and Training v Sinclair* [2005] NSWCA 465.

111. Mr Brennan has submitted that the respondent is unable to discharge its onus on the basis that it has not filed any medical evidence to establish the whole or predominant cause of the applicant's injury. I am not satisfied, however, that the respondent's failure to qualify an independent medical examiner is fatal to its defence. This is because I accept that the applicant's own medical evidence establishes that the predominant cause of her psychological injury was the respondent's letter alleging misconduct and the subsequent internal investigation.
112. I am satisfied that the issuing of this letter and the internal investigation that followed can broadly be described as action with respect to discipline. As found by the court in *Heggie*, a broad view is to be taken of the expression 'action with respect to discipline'. It is capable of extending to the entire process involved in disciplinary action, including the course of an investigation. Mr Brennan appeared to concede this point in his submissions.
113. What remains, is for the respondent to establish that its action was reasonable. The applicant claims that the action was not reasonable because the letter set out allegations that were factually incorrect and also not reflected in the ADVO application.
114. Mr Hammond has submitted that the veracity of the allegations was not determinative of whether the action taken by the respondent was reasonable.
115. I accept that there were two inaccuracies in the expression of the allegations of misconduct in the letter the applicant says she received on 13 February 2019. There is no evidence before me that interim orders had been issued in response to the ADVO application at the time the letter was given to the applicant. I also accept that the ADVO application did not specifically allege that the applicant or another person had broken into Mr Wilkinson's home.
116. I do not accept, however, that the inaccuracies I have found above involved a degree of negligence or carelessness in the preparation of the document such as to render the respondent's action in issuing it unreasonable. Rather the inaccuracies appear to reflect a lack of precision in interpreting and representing the ADVO application. The evidence before me does not indicate that the inaccuracies were deliberate or malicious.
117. Apart from these discrepancies, I am satisfied that the manner in which the allegations were expressed broadly aligned with the information set out in the ADVO application. It is clear from a comparison of the two documents that the allegations of misconduct derived from the ADVO application and were not otherwise invented or concocted by the employer.
118. The allegations in the ADVO application did not involve matters unrelated to the applicant's work. The allegations suggested a misuse of the applicant's position within the NSW Police Force to threaten or intimidate Mr Wilkinson. If correct, the allegations suggested a serious breach of the relevant code of conduct and a breach of the Crimes Act. Whether or not the allegations were true, I am satisfied that it was reasonable and appropriate for the allegations to be investigated by the respondent.
119. The evidence does not indicate that the allegations in the ADVO application were treated as factually correct by the employer or that they resulted in any final disciplinary action. Rather, interim safety measures were put in place while the allegations were investigated and the applicant invited to respond to them.
120. I am satisfied that the manner in which the allegations were put to the applicant for her response was reasonable. The letter addressed to the applicant made clear that the allegations were not yet proven or regarded as factually correct. The allegations were particularised, in writing, in sufficient detail and in a manner which would enable the applicant to meaningfully respond to them. The applicant was invited to respond to the allegations and given a reasonable period of time in which to do so, being two weeks from receipt of the letter. The applicant was advised of the consequences if the allegations were subsequently proven.

121. The evidence indicates that the applicant was in fact able to successfully respond to the allegations. A written response was prepared on her behalf by the Public Service Association. A further response was prepared by the applicant directly. It is apparent that the applicant's response was given appropriate consideration and resulted in a final decision that the allegations were not sustainable and the applicant had not engaged in misconduct. As a result, no disciplinary action was taken and no record of the complaint entered onto her personnel file. Nothing in the material before me suggests that the investigation of the allegations of misconduct or the outcome was procedurally unfair or otherwise unreasonable.
122. Although the applicant does not rely on the restrictions imposed under the Interim Risk Management Plan as being the main causative factor to her psychological injury I am further satisfied that such action, to the extent that it contributed to the applicant's psychological condition was reasonable and appropriate and may also be described as action with respect to discipline. The Interim Risk Management Plan does not appear on its face to be punitive. It makes clear that the allegations of misconduct and ADVO application were not finalised and the plan did not represent final management action. The strategy was voluntary and the applicant was made aware of and provided with appropriate support services and networks. The plan was, in my view, a reasonable interim response to the allegations made against the applicant having regard to the nature of the allegations and the applicant's position within the NSW Police Force.
123. Having regard to the evidence as a whole, I am satisfied that the applicant's psychological injury was predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to discipline pursuant to s 11A(1) of the 1987 Act.
124. It follows that the compensation sought by the applicant in respect of her psychological injury is not payable.
125. There will be an award for the respondent.

