

# WORKERS COMPENSATION COMMISSION

## CERTIFICATE OF DETERMINATION

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

**Matter Number:** 1443/20  
**Applicant:** Anthony Cooper  
**Respondent:** Booroongen Djugun Limited  
**Date of Determination:** 29 May 2020  
**Citation:** [2020] NSWCC 181

The Commission determines:

1. The applicant suffered psychological injury arising out of or in the course of his employment with the respondent deemed to have occurred on 29 October 2018.
2. The applicant's employment with the respondent was the main contributing factor to injury.
3. The injury not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to discipline.
4. The applicant has since 1 May 2019 had no current work capacity.
5. The applicant's pre-injury average weekly earnings are \$1,127.
6. The respondent is to pay the applicant \$901.60 per week from 1 May 2019 to date and continuing pursuant to s 37(1) of the *Workers Compensation Act 1987*.
7. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the *Workers Compensation Act 1987*.

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

Brett Batchelor  
**Arbitrator**

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

A Reynolds

Antony Reynolds  
Senior Dispute Services Officer  
**As delegate of the Registrar**



## STATEMENT OF REASONS

### BACKGROUND

1. Anthony Cooper (the applicant/Mr Cooper) seeks weekly benefits, and expenses pursuant to s 60 of the *Workers Compensation Act 1987* (the 1987 Act), as a result of psychological injury arising out of or in the course of his employment as a part-time registered nurse with Booroongen Djugun Limited (the respondent).
2. The applicant commenced employment with the respondent on the last occasion on 8 March 2018. He had previously worked at that facility for a period from about 1999/2000 until February 2002. The respondent operates an aged care home with 60 beds. It includes semi-independent living to palliative care. There are three buildings that include 20 separate units, a locked nursing home and an open nursing home. Mr Cooper's job description specified him as being responsible for "The coordination and delivery of individualised resident care through competent management of human and physical resources." He says that he had to perform all facets of the duties of a registered nurse plus the additional role as the facility manager during his shift.
3. At the commencement of his employment the applicant was contracted for eight hours per week only. However he says that he was offered three eight hour evening shifts per week plus additional shifts when other registered nurses took leave.
4. Mr Cooper says that when he previously worked for the respondent it was an aged care facility, but when he returned in March 2018, he found that it was more of a mental health facility. Of the 60 beds, at least half were occupied by mental health patients. He says that this was not disclosed to him when he returned in March 2018.
5. The applicant says that, during the course of his employment, whilst he did not struggle to perform the tasks required of him, there were far too many of such tasks expected of him in the role of a registered nurse. He raised a number of issues of concern in respect of his duties and the practices in place in the facility. He also says that he was confronted with abuse and violence from the residents in respect of his sexuality and when, for example, they were issued with insufficient cigarettes.
6. During the night shift of 7 October 2018, a check of the Schedule 8 (S8) drugs by two of the registered nurses revealed that three ampoules of 10 milligrams of morphine were found to be missing. Both nurses completed an incident report. Debra Urquhart (Ms Urquhart), the Director of Care of the respondent since 2008 and supervisor of all registered staff including the applicant, was informed of the missing morphine. She requested one of the registered nurses who discovered the missing morphine to inform the police, and this was done. She contacted each of the registered nurses individually to see if they knew anything about the missing morphine. She also spoke to the applicant by phone at the commencement of his shift at 2.30 pm on 7 October 2018 about the missing morphine. He denied any knowledge of it and was allowed to continue and work that shift.
7. Ms Urquhart commenced a formal investigation into the missing morphine on Monday 8 October 2018, which included interviewing each registered nurse when they commenced work and reviewing CCTV footage of the area of the treatment room where the S8 drugs were stored. From this it appeared that at 10.07 am on 3 October 2018 the applicant had entered this room and initially left the door open, which was normal practice. The applicant was out of sight for about three or four minutes, then returned to the doorway and purposely closed the door. He reappeared a few minutes later. From a review of the footage, Ms Urquhart did not identify any other time that a registered nurse had the opportunity to remove the ampoules. She suspected that the applicant was responsible for the removal of the ampoules.

8. After receiving legal advice that Mr Cooper should be suspended pending a full investigation, Ms Urquhart attempted to contact him. After her failure to either speak to the applicant by phone or obtain a response to a text message, a letter was hand delivered to him on Tuesday 9 October 2018.
9. Further communications by way of text messages and letter between the applicant and Ms Urquhart ensued, culminating in an interview on 17 October 2018. In attendance were the applicant and his support person and partner John Walsh, and on behalf of the respondent Ms Urquhart, Gary Morris the chief executive officer of the respondent and Christine Potts who took the minutes. The questions of Ms Urquhart and the applicant's answers were recorded by Ms Potts. At the conclusion of the meeting the applicant and Mr Walsh were asked to leave the room for a short time while the minutes were being prepared and reviewed by Ms Urquhart, Gary Morris and Christine Potts. On the return of the applicant and Mr Walsh, they were given a copy of the minutes which they read through, confirmed and signed. Ms Urquhart and Mr Morris also signed the minutes.
10. On 19 October 2018 a letter was delivered to the applicant containing advice that there was no evidence to suggest that he had misappropriated medications from the S8 cupboard, that the investigation had been concluded and that no disciplinary action would be taken against him.
11. The applicant did not return to work for his next rostered shift on 24 October 2018 and has not returned to work for the respondent since that time. Further communications ensued between the applicant, Ms Urquhart and Gary Morris culminating in an acceptance by Ms Urquhart of the applicant's "resignation" and a denial from him that he had resigned.
12. Mr Cooper consulted his general practitioner on 29 October 2018 who provided a general medical certificate of that date containing a certification of unfitness for duty from 24 October 2018. Subsequent medical certificates and WorkCover certificates of capacity were provided by the general practitioner, Dr David Ellis.
13. The applicant claims weekly payments pursuant to s 37 of the 1987 Act from 1 May 2019 to date and continuing. Pre-injury average weekly earnings (PIAWE) are agreed at \$1,127.
14. The respondent's defence to the applicant's claim is set out in review notice dated 22 November 2019 forwarded to the applicant by the respondent's insurer, Employers Mutual Limited (EML)<sup>1</sup>. In that notice EML maintains the decision originally made on 8 April 2019 to deny liability for the injury claimed by the applicant, relying in s 11A of the 1987 Act. Whilst EML acknowledges that Mr Cooper does suffer from a diagnosable injury, Adjustment Disorder, sustained in the course of his employment to which employment was the main contributing factor, it says that such 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.
15. At the telephone conference held on 14 April 2020 the following direction was made:
  - "1. The respondent is granted leave pursuant to s 289A(4) of the *Workplace Injury Management and Workers Compensation Act 1998* to put in issue injury (s 4 of the *Workers Compensation Act 1987* - 'the 1987 Act') due to unreasonable and unsafe expectations and practices at the applicant's workplace; being abused, intimidated and harassed by residents and other employees in his workplace; not being provided with appropriate training; and not being provided with appropriate support in the workplace.

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<sup>1</sup> Application to Resolve a Dispute (the Application) p 62.

2. The applicant is to lodge and serve by 28 April 2020 any further evidence on which he wishes to rely in respect of the issue on which leave is granted to the respondent referred to in [1] above.
  3. The respondent is to lodge and serve by 5 May 2020 any further evidence on which it wishes to rely in reply to the applicant's further evidence referred to in [2] above.
  4. The Application to Resolve a Dispute is amended to include a claim pursuant to s 60 of the 1987 Act.
  5. The matter is stood over for conciliation/arbitration by telephone conference at 10.00 am on Tuesday 19 May 2020.
  6. The parties are to comply with the Protocols for Telephone Conciliation/Arbitrations issued by the Commission on 20 March 2020."
16. At the arbitration hearing on 19 May 2020 the parties agreed that the correct date of injury was 29 October 2018, not 8 March 2018 as stated in the Application.

### **ISSUES FOR DETERMINATION**

17. The parties agree that the following issues remain in dispute:
- (a) Did the applicant suffer injury arising out of or in the course of his employment with the respondent due to unreasonable and unsafe expectations and practices at the applicant's workplace; being abused, intimidated and harassed by residents and other employees in his workplace; not being provided with appropriate training; and not being provided with appropriate support in the workplace (s 4 of the 1987 Act)?
  - (b) Was injury sustained by the applicant wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to discipline (s 11A of the 1987 Act)?

### **Matters not previously notified**

18. The direction made at the telephone conference on 14 April 2020 referred to in [15.1] above was made at the request of the respondent. Whilst it may appear to have otiose, the respondent wished to clarify the issue of injury arising out of or in the course of the applicant's employment per se as claimed by the applicant, as opposed to that asserted by the respondent as being caused by the reasonable action taken with respect to discipline.

### **PROCEDURE BEFORE THE COMMISSION**

19. The parties attended a conciliation conference and arbitration hearing on 19 May 2020 conducted by telephone. 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.
20. Mr A Parker of counsel attended the conciliation/arbitration on behalf of the applicant briefed by Ms M Obrist. The applicant attended on a separate telephone line. Mr A Combe of counsel attended on behalf of the respondent briefed by Ms L Rich. A representative of iCare also attended.

## EVIDENCE

### Documentary evidence

21. The following documents were in evidence before the Commission and taken into account in making this determination:
- (a) the Application and attached documents;
  - (b) Reply and attached documents;
  - (c) Application to Admit Late Documents dated 5 May 2020 lodged by the respondent with the following attachments:
    - (i) Work Capacity Decision of EML dated 16 January 2019;
    - (ii) Work Capacity Decision of EML dated 22 January 2019, and
    - (iii) Statement of Debra Urquhart dated 30 April 2020.

### Oral evidence

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

## SUBMISSIONS

23. The submissions of the parties are recorded in the transcript of the arbitration hearing on 19 May 2020 (T). I will not repeat them in full, but in summary they are as follows. The page references hereunder are to the page numbers in the Commission's electronic records of the documents.

### Applicant

#### Injury

24. The applicant submits that there can be no serious contest that he suffered psychological injury arising out of or in the course of his employment with the respondent, and cites a number of instances of real events which occurred in the course of his employment which gave rise to a perception on his part of an offensive or hostile working environment (*Attorney General's Department v K<sup>2</sup>*). These events, cumulatively, were capable of, and did cause, the applicant to suffer psychological injury.
25. The applicant submits that it is not material that he may have misperceived the real events that occurred in the workplace, or that his reaction to the events must have been reasonable, rational or proportional. These events are referred to in his statement dated 21 September 2019<sup>3</sup> from [17] onwards. A number of them are conceded by Ms Urquhart or not disputed by her. In summary they are:
- (a) chastisement by Ms Urquhart for not carrying a phone with him;
  - (b) having an excessive workload;
  - (c) being required to ration cigarettes to the patients, with the consequent abuse and violence from the patients for inadequate supply thereof;
  - (d) questioning as to why patients were allowed to smoke in the facility;

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<sup>2</sup> [2010] NSWCCPD 76 (*A G v K*).

<sup>3</sup> Application p 2.

- (e) the failure to have a security officer on site apart from when he was required to do the rounds and lock up at 6.00 pm each evening;
- (f) the rostering of trainee assistants in nursing (AINs) as fully qualified staff members who performed the role of a fully qualified AIN;
- (g) receiving a reprimand from Ms Urquhart when a trainee AIN was rostered to look after a patient who injured himself, when the trainee should have been rostered with a trained person;
- (h) raising with Ms Urquhart an incorrect practice of dressing all wounds with Bettadine, which was subsequently changed when an Aged Care accreditation took place;
- (i) complaints to Ms Urquhart about being underpaid pursuant to an incorrect pay scale;
- (j) complaints to Ms Urquhart and other RNs about issues and unsafe practices;
- (k) the weekly only checking of the S8 drug register when it should have been checked daily;
- (l) incorrect methods and times of administration of S8 medication to patients;
- (m) the failure of management to address homophobic comments made to a gay member of staff by residents, when this was raised at the first general staff meeting that the applicant attended. This led Mr Cooper not to raise it again for fear that the issue would be ignored;
- (n) complaints to Ms Urquhart about the poor work ethics and attendances of Aboriginal AINs, and the failure to discipline these persons;
- (o) the inability to take duty breaks because he was the only RN on call;
- (p) becoming overwhelmed by the workload and lack of breaks on a particular day, causing him to retreat into the medication room, close the door and break down crying. On this occasion Ms Urquhart spoke to Mr Cooper and advised him that she did not think that he was suited to work at the respondent and that it would be best if he looked for work elsewhere;
- (q) a claimed breach of confidentiality by Ms Urquhart when the “break down” incident just referred to became known to other staff, and
- (r) questioning other RNs as to their practices in dispensing S8 drugs, causing them to become abusive and defensive to Mr Cooper.

26. The applicant submits that, while Ms Urquhart takes issue with a number of these events, they were real events which occurred, that his evidence in respect thereof should be accepted and that they caused him to suffer psychological injury.

### **Section 11A**

27. The applicant submits that the action taken by the respondent with respect to discipline arising out of the missing morphine incident was not reasonable. He takes issue with the manner in which he was notified about the allegation of serious misconduct against him and the fact that until the meeting of 17 October 2018, he was unaware of an allegation of misconduct against him. The only issue of which Mr Cooper was aware was the issue of the missing morphine. He says that he had spoken to Ms Urquhart by phone on 7 October 2018

and informed her that he did not know anything about the missing morphine, and that when the letter dated 9 October 2018 was handed to him at his home by Susie Williams, he had not been accused of taking the morphine. The applicant also submits that the direction in the letter dated 9 October 2018 that he was not to contact or speak to any staff members without prior authority was unreasonable.

28. The applicant submits that the investigation of an isolated incident by the respondent, the missing morphine “morphed into” an investigation of his medication practices. Until the meeting of 17 October 2018 the applicant submits that he had no idea of what the allegations against him were, nor of who made those allegations.
29. The applicant also takes issue with the lack of confidentiality on the part of the respondent surrounding the investigation into his conduct. This was demonstrated to him when he attended a pharmacy in Kempsey to collect medication for his mother and was asked if he was still working for the respondent. Mr Cooper notes that Ms Urquhart, in the interview of 17 October 2018, apologised for this apparent breach of confidentiality.
30. The applicant submits that the lack of reasonableness of the actions of the respondent extends to the letter that was sent to him on 19 October 2018 advising him that there was no evidence to suggest that he had misappropriated medications from the S8 cupboard. This letter contained a reference to future performance and conduct, and a threat that should concerns be identified in respect of same, disciplinary action, up to and including the possible termination of the employment contract may be considered. Mr Cooper submits that any such threat was completely unnecessary and unreasonable in the context of the investigation being ostensibly into the disappearance of the morphine ampoules, and the failure of the respondent to notify him prior to the interview 17 October 2018 that other aspects of his conduct were being investigated.
31. The respondent also submits that it was unreasonable for Ms Urquhart to have interviewed the other RNs about the missing morphine, but not himself, although he does concede that he spoke to Ms Urquhart on the phone when he advised her he had nothing to do with the missing morphine.
32. The applicant submits that Ms Urquhart had before 8 October 2018 formed an opinion that he was responsible for the missing morphine and that it was a breach of procedural fairness for her not to have conveyed this to him. He submits that if he had not sustained a psychological injury by that time (which he says he had), it is clear that he would suffer such an injury because of the unreasonable actions of the respondent in carrying out its investigation into his conduct.
33. The applicant submits that the respondent has failed to discharge the onus on it to establish its defence under s 11A of the 1987 Act.

### **Other evidentiary matters**

34. The applicant submits that the evidence in the supplementary statement of Ms Urquhart dated 30 April 2020 corroborates the applicant’s evidence that he was working in a challenging and difficult environment capable of causing the psychological injury of which he complains. He submits that the respondent simply cannot suggest that the workplace in which he found himself from March 2018 was not causative of such injury.
35. In this regard the applicant relies upon what the Commission found in *Baker v Southern Metropolitan Cemeteries Trust*<sup>4</sup> at [83] that in a civil case there is no requirement for corroboration, and the reference at [84] to what Beasley JA (Campbell and Macfarlan JJA agreeing) explained in *Patrech v State of New South Wales*<sup>5</sup> that:

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<sup>4</sup> [2015] NSWCCPD 56 (*Baker*).

<sup>5</sup> [2009] NSWCA 118 at [77], [91] and [105].

“... it is unlikely that it is necessary (or even a relevant consideration) that a person must identify themselves as psychologically ill (that is, to have understood or believed his or her symptoms to constitute a mental illness) to find a psychological illness. The true question is whether the person was suffering symptoms, which properly diagnosed, constitute an illness.”

36. In respect of the lack of corroboration, the applicant acknowledges that he did not complain to his general practitioner, Dr Ellis, about depression until 29 October 2018 or refer the doctor to events in the workplace until that day<sup>6</sup>. However he points to the numerous complaints he made to his employer during the course of his employment which he says are in large part corroborated by the evidence of Ms Urquhart.
37. The applicant submits that having regard to the evidence of Dr Ellis, his treating psychiatrist Dr Alan Doris<sup>7</sup>, independent medical examiner Dr Ashwinder Anand<sup>8</sup> and independent medical examiner Dr Ben Teoh<sup>9</sup>, the question as to whether he suffered a psychological injury in accordance with s 4 of the 1987 Act was never in issue.

## Respondent

38. The respondent puts the applicant's credibility in issue, highlights the gravity of the incident when the three vials of morphine went missing and the consequent necessity for the respondent to investigate this. The respondent also points to Mr Cooper's failure to complain about any symptoms giving rise to an adjustment disorder until the second consultation he had with Dr Ellis on 29 October 2019 (noting that he had seen the doctor earlier in the day for other matters).
39. The respondent notes that the applicant is relying on the definition of injury referred to in either s 4 (b)(i) or (ii) of the 1987 Act, and to succeed in his claim the applicant must therefore show that his employment with the respondent was the main contributing factor to either the contraction of a disease or to the aggravation, acceleration, exacerbation or deterioration of a disease. He cannot do this because of the lack of corroboration in the form of complaint(s) to his medical practitioner, Dr Ellis, whose clinical notes in evidence commence from 2 October 2018. In this regard the respondent draws attention to an attendance on Dr Ellis on 16 October 2018, described as a "benign interview", in which there is no reference to any complaint about bullying in the workplace or symptoms of psychological injury.
40. The respondent submits that even in the second consultation with Dr Ellis on 29 October 2018, the applicant makes no reference to bullying, harassment or excessive workload in the workplace. The applicant cannot therefore show that his employment was the main contributing factor to his injury.
41. In respect of the applicant's credibility, the respondent noted that he lied to his employer when it was investigating the incident. This is apparent from a comparison of the minutes of the meeting of 17 October 2018, attended by the applicant, Mr Walsh, Gary Morris, Ms Urquhart and Christine Potts<sup>10</sup>, with the applicant's evidence at [87]-[88] of his statement dated 21 February 2018<sup>11</sup>. The real reason given by the applicant for entering the treatment room and deliberately closing the door for a few minutes is in his statement. The respondent submits that if the applicant lied in an investigation as serious as that in which he was involved, the apparent theft of an S8 drug, his credibility is called seriously into question. His evidence should therefore be rejected unless it is corroborated by other evidence.

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<sup>6</sup> Clinical note dated 29 October 2018 Application p 131.

<sup>7</sup> Report dated 18 July 2019 Application p 68.

<sup>8</sup> Report dated 3 April 2019 Reply p 151.

<sup>9</sup> Report dated 10 September 2019 p 72.

<sup>10</sup> Application p 50.

<sup>11</sup> Application pp 19-20.



42. The Commission should not therefore accept the applicant's evidence of the events in the workplace of which he complains gave rise to his injury. There is insufficient evidence to find that employment was the main contributing factor to injury.
43. The respondent also notes that the applicant had no time off work until the investigation into the disappearance of the morphine ampoules. The first date of claimed incapacity is 28 October 2018.
44. The respondent submits that the evidence of Dr Teoh as to the cause of the applicant's psychological injury cannot be accepted as in the history recorded by the doctor there is no reference to the disappearance and/or theft of the morphine. Dr Teoh did not take into account the effect on the applicant of the investigation of the theft of the morphine, and therefore did not attribute the investigation to the cause of injury.
45. The respondent relies on what Dr Ellis says in a handwritten report to EML dated 26 February 2019<sup>12</sup>. At [3] in the report Dr Ellis records the self-reporting of the applicant of bullying from the commencement of his employment from peers, patients, and managers, and that a major stressor was being stood down and investigated for alleged opioid theft, later cleared. At [4] the doctor notes that the applicant worked for seven months for the employer until being investigated, and that he believes that this, that is the investigation, is the primary cause of the applicant's current condition.
46. The respondent submits that Ms Urquhart had no vested interest in the matter apart from carrying out an investigation into the serious matter of the apparent theft of an S8 drug, that she did not lie to the applicant in respect of the investigation (but he lied to her) and that she demonstrated procedural fairness in the investigation. The actions of the employer were reasonable in suspending the applicant on full pay having regard to what she saw on the CCTV evidence as to the applicant's actions in entering the treatment room and closing the door for a couple of minutes. He was the registered nurse on duty at that time.
47. The respondent submits that the applicant knew from 7 October 2018, when there was a telephone conversation between him and Ms Urquhart, as to the reason for the investigation.
48. The respondent refers to the applicant's employment contract signed by him<sup>13</sup>, the duties of a registered nurse<sup>14</sup> and the obligation to count the S8 drugs and dispense and administer them as required, referred to in the Duty statement<sup>15</sup>. The respondent also points to the Policy Statement in the document headed "POLICY – EMPLOYEE RESPONSIBILITIES"<sup>16</sup>, and the presumption of innocence of individuals who are the subject of an investigation referred to therein<sup>17</sup>. The respondent submits that it acted in accordance with its own policy documents in investigating what appeared to be serious misconduct, and the applicant was treated in a fair and just manner. This is evident from an examination of the evidence of Ms Urquhart in her statement dated 6 December 2019<sup>18</sup> where she outlines the steps she took on being informed of the missing morphine.
49. The respondent points to the applicant's own evidence that the door to the treatment room is normally left open, and the lie that he gave at the investigation of the matter on 17 October 2018 (going into the room to maybe make a private phone call), which was in itself a breach of the respondent's rule of allowing such phone calls in breaks only.

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<sup>12</sup> Reply p 149.

<sup>13</sup> Reply p 62.

<sup>14</sup> Reply p 85.

<sup>15</sup> Reply p 88.

<sup>16</sup> Reply p 93.

<sup>17</sup> See [9] at Reply p 98.

<sup>18</sup> Reply p 46.

50. The respondent submits that the “threat” of termination of employment in the letter dated 19 October 2018 advising of the outcome of the investigation was an “innocuous statement” and not unreasonable in the circumstances.
51. The respondent relies upon the decision of the Commission in *Ponnan v Great western Foods Ltd*<sup>19</sup> at [24] where Acting Deputy president Robin Handley expressed the view that the ordinary meaning of the words “predominantly caused” is that of mainly or principally caused, citing The Macquarie Concise Dictionary and The Oxford Concise Dictionary.

### **Applicant in response**

52. On the question of the credibility of the applicant, the applicant submits that his credit is not impugned by what he told Ms Urquhart and Gary Morris in the interview on 17 October 2018, as he owns up to the true reason why he closed the door of the treatment room when interviewed by the investigator on 5 February 2019. The reason appears at [87]-[88] of the statement dated 21 February 2019 and provides a valid explanation for the untruth given on 17 October 2018. The applicant submits that this bolsters his credibility.
53. The applicant cautioned that not too much reliance should be placed on the clinical notes of the general practitioner for the reasons outlined by Basten JA in *Mason v Demaas*<sup>20</sup> at [2], noting that the clinical notes of a practitioner do not always reflect what was said by a patient.
54. The applicant submits that, in accordance with what Dr Ellis certified in the medical certificates and WorkCover certificates of capacity, the disciplinary action taken by the respondent was the last in a series of events causing the applicant to suffer psychological injury; in essence “the straw that broke the camel’s back.” In this regard the applicant refers to what Dr Ellis says at [5] in his handwritten report dated 26 February 2019 (referred to above at [45]). The applicant submits that the way that question was posed to the doctor, and his answer thereto, suggests that he was suffering from psychological injury before “the workplace event” referred to in the answer, and that there was a marked deterioration thereafter.
55. The applicant notes that the opinion of Dr Teoh does not address the s 11A issue at all but should be accepted as supporting a finding of injury arising out of or in the course of the applicant’s employment with the respondent over the seven month period thereof.

## **FINDINGS AND REASONS**

### **Injury - section 4 of the 1987 Act**

56. In *Baker* Deputy president Bill Roche held that where it is alleged that the hostile work environment alleged by a worker 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 a hostile work environment existed. In this regard the Deputy President at [66] set out the general principles concerning psychological injury cases, summarised in *A G v K* as follows:
  - “(a) employers take their employees as they find them. There is an ‘egg-shell psyche’ principle which is the equivalent of the ‘egg-shell skull’ principle (Spigelman CJ in *State Transit Authority of New South Wales v Chemler* [2007] NSWCA 249; 5 DDCR 286 (*Chemler*) at [40]);

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<sup>19</sup> [2007] NSWCCPD 92.

<sup>20</sup> [2009] NSWCA 227 (*Mason v Demas*).

- (b) a perception of real events, which are not external events, can satisfy the test of injury arising out of or in the course of employment (Spigelman CJ in *Chemler* at [54]);
- (c) if events which actually occurred in the workplace were perceived as creating an offensive or hostile working environment, and a psychological injury followed, it is open to the Commission to conclude that causation is established (Basten JA in *Chemler* at [69]);
- (d) so long as the events within the workplace were real, rather than imaginary, it does not matter that they affected the worker's psyche because of a flawed perception of events because of a disordered mind (President Hall in *Leigh Sheridan v Q-Comp* [2009] QIC 12; 191 QGIG 13);
- (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 v Comcare Australia* [2002] FCA 1464 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."

57. The events complained of by the applicant as creating a hostile working environment are summarised above at [25]. Ms Urquhart addresses a number of these in her statements dated 6 December 2019<sup>21</sup> and 30 April 2020.

58. At [27] in her statement dated 6 December 2019 Ms Urquhart acknowledges that the applicant had trouble with his behaviour management of the respondent's challenging residents and was very critical and judgemental of the care of various residents. She says that she would hear this from other staff members, but little or no communication from the applicant. Ms Urquhart does refer to one incident when she discovered the applicant in the treatment room sitting on a box of cups distraught on his phone and appearing to be crying. After several requests Mr Cooper revealed that he was upset about being abused by a resident whilst (the resident) was asking for cigarettes. The problem of this type of behaviour from some of the residents, who exhibited alcohol or drug related behaviour or were suffering from dementia, was acknowledged by Ms Urquhart. She said that the applicant was made aware of the type of behaviour he would face when she interviewed him.

59. Ms Urquhart also said to the applicant that if the behaviour of the residents was too much, maybe he should look elsewhere where there are not so many difficult residents to look after. She believes that Mr Cooper, after previously working in a controlled environment at Kempsey Hospital, found it very overwhelming working for the respondent, and that she was giving him a way out, not telling him to leave.

60. This incident was also referred to by Ms Urquhart in her later statement dated 30 April 2020, where she says that she was shocked to see Mr Cooper so distressed. In that statement Ms Urquhart also refers to the constant complaints of the applicant about the workload and lack of breaks, but also says that he was seen on breaks smoking and drinking coffee on numerous occasions when she enquired of him how he was feeling.

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<sup>21</sup> Reply p 46 and AALD 5 May 2020 p 8.

61. Ms Urquhart does not specifically refer to Mr Cooper's questioning as to why patients were allowed to smoke in the facility, or the alleged failure to have a security officer on site apart from when required to do the rounds and lock up at 6.00 pm each evening. She also does not appear to refer to his complaints in respect of the rostering of trainee AINs and their poor work ethics, an incorrect practice of dressing wounds with Bettadine (which subsequently changed when Aged Care accreditation took place) or apparent underpayment pursuant to an incorrect pay scale.
62. The matter of the weekly checking of the S8 drugs as opposed to daily checking appears to have been one of concern to Ms Urquhart. Mr Cooper raised this in the interview on 17 October 2018, noting that medication policy indicated a daily check, however it had been changed to weekly<sup>22</sup>. Ms Urquhart acknowledged this and that, on the occasion of a Medtrax visit six months previously when she had been unwell, the checking had been changed to weekly, a process that she said had now been reversed. When supplying that statement, Ms Urquhart also made the point that on receipt of a complaint about the S8 medication, she was obliged to investigate the matter.
63. Ms Urquhart addresses the complaint of Mr Cooper about his inability to take duty work breaks because he was the only RN on call. She says at [13] in her statement dated 30 April 2020 that RNs in aged care are expected to stay onsite if they are the manager for the shift, but that this did not mean that they would not receive their regular breaks. She then says that "Time management is part of the role of the Registered Nurse, however I did ask how he was doing and he responded negatively and seemed as though he was feeling overwhelmed." In the following paragraph Ms Urquhart says "Aged care is not an easy choice for Registered Nurses it places many demands upon you. It is challenging and difficult to care for those underprivileged and minority groups." [sic]
64. In his consultation with Dr Ellis at 13:58:28 on 29 October 2018<sup>23</sup> the history he gave is as follows:
- "Mood low since partner suicided 18m ago, father died 12 m ago  
 Sleep poor  
 Recently stood down from position at?aboriginal run RCAF / mental health facility  
 Accused of taking morphine which he denies  
 Later cleared but told would be 'monitored'  
 States opioid checking at facility very poor  
 States cant RTW, doesnt even want to return to nursing" [sic]
65. Although the respondent noted that this entry represents the first occasion on which the applicant complained to his general practitioner of conditions at his place of employment, it is some corroboration of the complaints of the applicant in respect of the work practices at the respondent's premises. In my view it is also some evidence of the frustration felt by Mr Cooper in respect his work at the respondent's facility when he says that he cannot return to work or does not even want to return to nursing. The fact of the investigation into his conduct in respect of the serious matter of a missing S8 drug, a matter for which he was cleared of any wrongdoing, could be viewed as the last of a series of incidents in the workplace creating what was perceived by Mr Cooper as creating a hostile environment and capable of causing him to decompensate into psychological illness; the "straw that broke the camel's back" in accordance with a submission of the applicant.
66. The respondent puts the applicant's credit very much in issue in view of the lie that he gave in answer to a question put to him in the interview on 17 October 2018 as to why he entered the treatment room and closed the door behind him. He told Ms Urquhart and Gary Morris that "Maybe I had a private phone call or something, there's no other reason to close the

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<sup>22</sup> Application p 52.

<sup>23</sup> Application p 131.

door.” When Mr Cooper was interviewed by the investigator on 5 February 2019 for the statement that he signed on 21 February 2019, he gave what he said was the real reason for closing the S8 door. He said that he did not want to give this reason as he had been vilified all of his life and if the real reason was given it would be out for the staff to talk about, and would be around town as it was when he was first suspended. I draw the quite clear inference from this statement that this vilification he refers to was because of his homosexuality. The real reason is given in [88] of the statement, that is, Mr Cooper has “prince albert” piecing and it was pinching him, so he went into the room and closed the door for privacy to stop the pinching. This is the reason he untruthfully stated at the interview on 17 October 2018 that he was taking a private phone call when he closed the door of the treatment room.

67. The applicant submits that, notwithstanding the lie given on 17 October 2018, it is to his credit that he gave the investigator taking his statement the real reason for closing the door of the treatment room. I think that there is merit in this submission, and a ring of truth in the reason given by Mr Cooper as to why he did not tell the truth to Ms Urquhart and Gary Morris on 17 October 2018.
68. In that same interview, Ms Urquhart apologised for the apparent breach of confidentiality on the part of the respondent when Mr Cooper complains that he was asked if he was still working for the respondent when he went into Raymond’s Pharmacy to pick up medication for his mother. Ms Urquhart does refer to this apparent breach of confidentiality at [65] of her statement dated 6 December 2018. She says that she made an investigation into the allegation, and during the process contacted the pharmacy involved. She said that the allegation was denied, and that they knew nothing about the matter at all. She also said that nothing had come back to her to confirm that Anthony’s allegation did in fact occur.
69. On this particular point I accept what the applicant says as to what he was asked about his continuing employment by the respondent when he attended Raymond’s Pharmacy. Ms Urquhart’s statement is hearsay. There is no evidence as to when she attended the pharmacy, who she spoke to, what was actually said in the conversation, who was the pharmacist in charge of the shop or the number of employees in the shop. I cannot see why the applicant would complain about a breach of confidentiality to Ms Urquhart and Gary Morris if the conversation in Raymond’s Pharmacy he refers to did not occur.
70. A final matter that should be discussed to in respect of the applicant’s complaints about conditions in the workplace, and his credibility, is what occurred at the staff meeting on his first day at work with the respondent. This is referred to at [59] of the applicant’s statement and at [7]-[11] of Ms Urquhart’s statement dated 30 April 2020. The applicant notes that a former AIN raised the question of his vilification by some of the residents because of the fact that he was gay. The applicant says that a person who he thinks was Val Marsh said to Corey “Suck it up and deal with it, there are people that come from a generation where it was ok for them to treat people that way”. Ms Urquhart denies that Val Marsh made such a derogatory remark (noting that her grandson is gay), and nevertheless notes that residents did not have the capacity or insight into what effect their unwelcome comments may have on staff members as they lack insight or understanding. She says that it is an issue that is hard to control, and notes that the staff member was Shaun. She reviewed the minutes of the meeting dated April 2018 and notes a reference to homophobia and again makes mention of the capacity of residents to understand their actions and their insight.
71. Irrespective of what was said at the meeting or by whom, there is no doubt that the question of homophobia was discussed at that meeting, and that the applicant was probably justified in his statement at [59] that as nothing was done about the subject when Corey raised it, he felt that there was no point in raising it himself. He said that as he is gay, he has also been subjected to the same treatment by residents.
72. My finding is that the applicant’s credibility has not been impugned by the untruth he told the investigators into the S8 drug disappearance on 17 October 2018.

73. In making this finding I acknowledge that the respondent, in the form of Ms Urquhart, was obliged to enquire into and investigate the very serious issue of the disappearance of the S8 drugs when she was informed of the matter. The s 11A issue in respect of this investigation is referred to hereunder.
74. There is no doubt that the applicant is suffering from a psychological injury. Dr Ellis diagnosed depression when he saw Mr Cooper on 29 October 2018. In the WorkCover certificates of capacity issued by Dr Ellis<sup>24</sup> he diagnoses “Bullying; adjustment disorder”. In his report to EML dated 26 February 2019 referred to above at [45] and [54] he diagnoses a psychological injury. Dr Doris, the treating psychiatrist who reported to Dr Ellis on the applicant on 18 July 2019<sup>25</sup> diagnosed a major depressive episode with anxious distress of moderate severity. Dr Anand found Mr Cooper met the diagnosis of adjustment disorder with mixed anxiety and depressed mood and found that employment was the main contributing factor. He found that the proposed disciplinary action by the respondent was the whole or predominant cause of the applicant’s injury. Dr Teoh on 10 September 2019 found that the applicant’s presentation was consistent with a diagnosis of a Chronic Adjustment Disorder with Mixed Anxious and Depressed Mood, caused by his employment with the respondent. EML in its review notice dated 22 November 2019 confirms a diagnosis of Adjustment Disorder on the available evidence, sustained in the course of the applicant’s employment with the respondent, to which employment was the main contributing factor. It relies on the s 11A defence raised therein.
75. My finding is that there were a number of undisputed incidents in the course of the applicant’s employment with the respondent sufficient to give rise to a perception of a hostile working environment on the part of the applicant, and which had the potential to cause the applicant to suffer psychological injury.
76. The respondent places reliance on the report of Dr Ellis dated 26 February 2019 at [4] thereof, where Dr Ellis is asked:
- “Can you kindly outline your clinical rationale as to why these stressors have *resulted from this recent incident* and not for example, from the recent previous stressors associated with his most recent work related incident/investigation when employed at Kempsey Hospital during the last 12 month period.” (emphasis in original)
- to which Dr Ellis replies:
- “Nothing occurs in isolation. I note that Anthony worked for 7 months with current employer (after any prior incidents) until being investigated. I believe this is the primary cause of his current condition.”
77. The evidence of the applicant’s employment at Kempsey Hospital appears at [10]-[12] of his statement 2019. After a period of nine months off work because of illness from about March 2016, Mr Cooper returned to work there until March 2018. In the lead up to leaving that hospital he was accused by the Director of Nursing of sharing private information of a patient with a third party. The applicant says that the accusation was proved to be false and legal proceedings were commenced as a result. The answer of Dr Ellis appears to discount any psychological sequelae as a result of what happened at Kempsey Hospital, which confirms what the applicant says at [26] of his statement about his mental health following this incident. Later in the statement the applicant acknowledges that in 2017 he did lose his partner of 15 years, which he says did affect him at the time but has not contributed to the current claim. The loss of Mr Cooper’s partner to suicide is referred to in Dr Ellis’ clinical note of 29 October 2018.

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<sup>24</sup> Application from p 141.

<sup>25</sup> Application p 68.

78. At [5] in the report dated 26 February 2018 the question is posed of Dr Ellis in the following terms:

“Is it possible that Anthony has not recovered from *his previous workplace episode of conflict with management* over workload and other allegations? Is it possible does not also have any depression or anxiety type symptoms that could be correlated to his recent bereavement due to the death of his partner in the last 2 years?” [sic],

to which Dr Ellis replies:

“I saw Anthony once prior to the workplace event. His mood was a little low but not unduly so, there was marked deterioration after the workplace event.”

79. The question in [5] refers to a “...*previous episode of conflict with management* over workload and other allegations” and I infer refers to the applicant’s complaints against the respondent. In this question the author appears to accept that a previous episode of conflict with management over workload and other allegations. The answer of Dr Ellis also appears to discount any ongoing serious symptoms as a result of bereavement due to the death of the applicant’s partner.

80. In my view the events complained of by the applicant referred to in [75] above together with the suspicion that he was responsible for taking the S8 drugs from the treatment room were the main contributing factors in Mr Cooper suffering the psychological injury diagnosed by the doctors. The investigation into the disappearance of the drugs was the last in a long line of events which created in the applicant a perception of a hostile workplace. In terms of s 11A, the action taken by the respondent with respect to discipline was not the whole or predominant cause of the applicant’s injury.

### Section 11A defence

81. In the event that I am wrong in my finding at [80] above and in deference to the parties’ submissions, I will deal with the defence raised by the respondent under this section, the onus of proof of which it bears.

82. The chronology of events between 7 October 2018 and 19 October 2018 in respect of the disciplinary action taken by the respondent against the applicant is as follows:

<b>Date</b>	<b>Contact/Correspondence</b>
7 October 2018	Applicant commences shift at 2.30 pm and is requested to phone Ms Urquhart. He does this and is questioned by her about morphine missing from the S8 cupboard of the nursing home. Mr Cooper states that he does not know anything about it <sup>26</sup> .
9 October 2017	Letter from Ms Urquhart to applicant re suspension from duties <sup>27</sup> .
11 October 2018	Text (described in undated letter hereunder as email) message from the applicant to Ms Urquhart <sup>28</sup> .

<sup>26</sup> Applicant’s statement Application p 16.

<sup>27</sup> Application p 45.

<sup>28</sup> See Application p 47.

- Undated "Private and Confidential" letter from Ms Urquhart to the applicant<sup>29</sup>.
- 16 October 2018 Letter from Ms Urquhart to the applicant re notice to attend interview<sup>30</sup>.
- 17 October 2018 Meeting attended by the applicant, John Walsh, Ms Urquhart and Gary Morris, with Christine Potts taking the minutes<sup>31</sup>.
- 19 October 2018 Letter from Ms Urquhart to the applicant advising that there was no evidence to suggest that the applicant misappropriated medications from the S8 cupboard<sup>32</sup>.

83. Having regard to what Ms Urquhart says at [52] in her statement dated 6 December 2019, the text message dated 11 October 2018 referred to above appears to be the message at pp 40 and 41 of the Application. In that message the applicant is seeking an explanation as to why he was suspended and also mentions misleading hours at his initial interview and employment and other issues. Mr Cooper asks among other things for an explanation of matters mentioned therein, including his suspension, and seeks an opportunity to reply if there are allegations that warrant his suspension.
84. The letter of 9 October 2018 refers to a number of allegations regarding the applicant's alleged conduct as a registered nurse, which if substantiated may indicate that the applicant had breached a number of his professional and organisational obligations. No details of the alleged conduct are provided. Pursuant to the letter the applicant was suspended with pay from all duties. Advice is given in the letter that Mr Cooper will be invited to attend an interview in the near future in respect of the allegations relating to his conduct. The applicant is also directed not to present at the respondent's facility or make contact with staff, residents, or relatives of the facility without the prior authorisation of management.
85. In the undated "Private and Confidential" letter to the applicant Ms Urquhart advises the applicant that the concerns that "we are currently investigating are related to your medication practices," and that the applicant will receive a letter on Monday 15 October 2018 instructing him to attend a meeting at the facility where he will be asked to respond to the concerns. Mr Cooper is also advised that in the foreshadowed letter he will be provided with full details of the information that has come to light during the investigation, and that he may also bring a support person to the meeting.
86. The letter that was foreshadowed for 15 October 2018 was in fact sent by Ms Urquhart on 16 October 2018 and requires the applicant to attend the following day "... to assist with management's investigation of the information provided." Ms Urquhart then gives details into the investigation of the three ampoules of Morphine Sulphate that were unable to be accounted for on 7 October 2018 and the review of the S8 Register. She goes on to say:

"During our Investigation, there was little evidence to confirm how the 3 x ampoules of morphine went missing, however we also note, that a number of your colleagues during discussions with us, highlighted concerns about your medication practices, and in some Instances, even suggested that you may have taken the missing morphine.

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<sup>29</sup> See [52] of Ms Urquhart's statement at Reply p 54 and Application p 47.

<sup>30</sup> Application p 48.

<sup>31</sup> Application p 50.

<sup>32</sup> Application p 54.



In light of the concerns raised by multiple members of our team, this meeting has been organized to allow you an opportunity to respond to the information provided. In addition to this, we will also seek to learn from you what your understanding of our S8 Medication practices are and how you undertook the S8 medication related aspects of your role in the week 01/10/2018 to 07/10/2018.

Please understand that no determinations have been made with respect to this matter and that the purpose of this discussion is to learn directly from you, how you undertake elements of your role. Please note however, that in the event that we find that you have been undertaking your role in a manner which contravenes our medication management policy, it may result in disciplinary action, up to and including the possible termination of your employment contract.”

The letter concludes with a further direction not to approach or discuss any matter outlined therein with any member of staff or resident in the facility.

87. In the minutes of the meeting of 17 October 2018 the applicant acknowledges in his first answer having received “the letter” and says “...but I don’t understand what it’s all about, what the allegations are about and who made them and why.” In the next answer Mr Cooper acknowledges that he knows that the meeting is about the missing morphine but says that he does not understand why the finger is being pointed at him. Thereafter there are questions and answers about the missing morphine, and the applicant states his awareness of the Medication Policy and systems relating to Schedule 8 administration and documentation. Further questions and answers relate to what happened on “3rd November”<sup>33</sup> [sic, October] 2018 when the applicant entered the treatment room and is seen on the video surveillance to enter that room and purposely close the door for a few minutes. At that stage, the applicant gives the untruthful answer as to why he closed the door of the treatment room, discussed above.
88. The applicant later in the interview raises questions, and complaints about “the letter” and the practices of the registered nurses over time, alleging that they are “getting back at me” because he has questioned their practices. He says that he has worked over 11 years and never had a medication incident until this time. He then asks as to who said what about him, a request for information that is declined by Ms Urquhart. The change of medication checking from weekly to daily checking is then discussed. Mr Cooper then says:

“All the RNs were interviewed. I spoke to you on the phone and I wasn't interviewed, I didn't have my chance to say anything about the incident.”

Ms Urquhart says that she did give Mr Cooper the chance, that she rang him straight away and was told that he had no knowledge of the missing ampoules. There is then a question and answer about the Raymond’s Pharmacy incident, that is, the apparent breach of confidentiality.

89. The letter of 19 October 2018 reiterates the history of the matter and the meeting of 17 October 2019. Ms Urquhart states that there is no evidence to suggest that the applicant misappropriated medications from the S8 cupboard and that no disciplinary action will be taken against the applicant. The third last paragraph of the letter is in the following terms:

“Whilst we do hope that this matter is resolved, you do need to be aware that should concerns be identified in the future with regards to your performance and conduct, disciplinary action, up to and including the possible termination of your employment contract may be considered.”

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<sup>33</sup> Application p 51.

90. From this summary of events over the period from 7 to 19 October 2018 it is apparent that the applicant was directed to attend the meeting on 17 October 2018 on one day's notice and informed he could bring a support person, which he did. He was not encouraged to seek assistance from his legal representative or other advocacy body in accordance with the "**POLICY – EMPLOYEE RESPONSIBILITIES**" document of the respondent in evidence<sup>34</sup>. More importantly, while it is acknowledged that the respondent was obliged to investigate the serious matter of the missing morphine, and that the applicant was aware that this was the reason he was called to the meeting on 17 October 2018, he was not given any particulars of the concerns that the multiple members of the staff of the respondent had about the applicant's medication practices or given any chance to respond to concerns so expressed. He was directed not to contact other members of staff, and on attending the meeting on 17 October 2018, apart from the matter of the investigation of the missing morphine, was left in the dark as to why he was called to the meeting. This is apparent from his answer given by the applicant quoted in [87] above. The warning given to the applicant in the letter dated 19 October 2018 set out in [89] above is in my view evidence that the respondent still entertained concerns about the applicant's conduct following the investigation into the missing morphine, notwithstanding that fact that the enquiry had failed to uncover any evidence to inculcate him. Mr Cooper was never given a chance to address these concerns raised by other staff members.
91. Ms Urquhart stated in the letter dated 16 October 2018 that no determinations had been made with respect to the matter of the missing morphine. The presumption of innocence of individuals who are the subject of an investigation is referred to in the policy document referred to in [90] above. Nevertheless it is clear from her statement that, after having reviewed the CCTV footage of the treatment room dated 3 October 2018, that Ms Urquhart suspected that the applicant was responsible for taking the ampoules of morphine from the treatment room. This suspicion may have influenced her approach to the investigation, and her ongoing concern after the meeting of 17 October 2018 about the applicant's conduct.
92. In my view, having regard to the matters I have summarised above, the actions of the respondent in its investigation into the missing morphine and other apparent concerns about the applicant's conduct raised by multiple members of the respondent's staff, were not reasonable. There was a lack of procedural fairness in the way in which the applicant, on short notice of the meeting of 17 October 2018, was given a chance to meet allegations about his conduct raised by other staff members of the respondent. Further, because of this failure to allow the applicant to address these concerns raised, or any findings by the respondent thereon, there was no need to issue to the respondent the warning about future conduct referred to in [89] above.
93. The respondent has not discharged the onus of proof on it to show that its actions with respect to discipline were reasonable.

#### **Weekly benefits/section 60 expenses**

94. The respondent denied liability for weekly benefits pursuant to s 33 of the 1987 Act and s 60 expenses on the basis that the applicant did not have total or partial incapacity for work resulting from an injury, that is, an injury for which it was liable to pay compensation to the applicant. It denied liability relying on its s 11A defence.
95. No submissions were put on behalf of the respondent that the applicant was not incapacitated for work in the event that the respondent was unsuccessful in its defence.
96. Dr Teoh found on his examination of Mr Cooper on 3 September 2019 that he had not been able to return to his pre-injury occupation, and that he was not fit to work at all at that stage.

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<sup>34</sup> See [9] p 98 Reply.

97. Dr Ellis issued two medical certificates dated 29 October 2018 and 5 November 2018<sup>35</sup> containing certification of the applicant's unfitness to continue his normal occupation over the period from 24 October to 16 November 2018. Dr Ellis then issued a series of WorkCover certificates of capacity covering the period from 29 October 2018 to 13 February 2020<sup>36</sup> containing certification that the applicant had no current capacity for any employment.
98. On the question of capacity Dr Ashwinder Anand in his report dated 3 April 2019<sup>37</sup> expressed the opinions that:
- (a) the prognosis regarding improvement in Mr Cooper's psychological condition was good, but very poor with regard to return to work in his pre-injury employment. He said that he will never be able to return to his pre-injury workplace, but his prognosis for return to usual activities of daily living was good, and
  - (b) the applicant's motivation for returning to work in his own or any other occupation appears to be limited.
99. I think that Dr Ellis, as the general practitioner who has treated the applicant for his psychological condition since the consultation on 29 October 2018, is in a better position than Dr Anand to assess his capacity for employment. His opinion, taken with that of Dr Teoh, leads me to the finding that the applicant has had no current work capacity from the date from which weekly benefits are claimed, 1 May 2019, to date. There will be an award in the applicant's favour from this date pursuant to s 37(1) of the 1987 Act at 80% of the agreed PIAWE of \$1,127.
100. There will also be a general order for the payment of medical expenses pursuant to s 60 of the 1987 Act.

## **SUMMARY**

101. The applicant suffered psychological injury arising out of or in the course of his employment with the respondent deemed to have occurred on 29 October 2018.
102. The applicant's employment with the respondent was the main contributing factor to injury.
103. The injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the respondent with respect to discipline.
104. The applicant has since 1 May 2019 had no current work capacity.
105. The applicant's PIAWE are \$1,127.
106. The respondent is to pay the applicant \$901.60 per week from 1 May 2019 to date and continuing pursuant to s 37(1) of the 1987 Act.
107. The respondent is to pay the applicant's costs and expenses pursuant to s 60 of the 1987 Act.

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<sup>35</sup> Application pp121 and 120.

<sup>36</sup> Application pp 119 to 78.

<sup>37</sup> Reply p 151.