

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 2986/19
Applicant: MARION THERESE MCDONALD
Respondent: H V TRANSFER LIMITED
Date of Determination: 10 SEPTEMBER 2019
CITATION: [2019] NSWCC 296

The Commission determines:

1. Award in favour of the applicant against the respondent in respect of weekly payments of compensation pursuant to section 37(1) of the *Workers Compensation Act 1987* in the sum of \$1,163.20 per week from 5 July 2019 to date and continuing.
2. A general award is made in favour of the applicant in respect of section 60 expenses

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

PHILIP YOUNG
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 PHILIP YOUNG, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Marion Therese McDonald (the applicant) has commenced proceedings in the Commission against H V Transfer Limited (the respondent) seeking weekly payments of compensation. A claim is also made for medical and associated expenses pursuant to section 60 of the *Workers Compensation Act 1987* (the 1987 Act).
2. The applicant's claim has been amended to a claim for weekly payments commencing from 5 July 2019 to date and continuing. The applicant relies upon various incidents in the course of her employment up until 11 July 2018. She refers to "bullying" on the part of officers of the respondent.
3. The respondent suspended the applicant's employment by letter of 11 August 2018. The claim from 5 July 2019 is at 80% of the applicant's pre-injury average weekly earnings, namely \$1,163.20 per week. The applicant received payments until 4 July 2019.
4. The applicant's injury is particularised as a psychological injury, which the employer admits. The only issue is the employer's defence under section 11A of the 1987 Act which relies upon a letter from the respondent to the applicant dated 11 July 2018 (the letter).

ISSUES FOR DETERMINATION

5. The issue for determination is whether the respondent can establish that the applicant's psychological condition was caused by its letter to the applicant dated 11 July 2018, such that the applicant's psychological condition was "wholly or predominantly" caused by "reasonable action" taken by the respondent in respect of performance appraisal or discipline.

PROCEDURE BEFORE THE COMMISSION

6. The matter came for conciliation and arbitration hearing in Newcastle on 29 August 2019. Mr S Hunt of Counsel instructed by Mr P Mantach appeared for and with the worker. The worker had a support person present. Mr L Robison of Counsel appeared for the respondent.
7. There were some preliminary objections which Mr Hunt advanced. First, Mr Hunt referred to the report from Lee Kelly and Associates, objecting to the lengthy summary and conclusions of that report. Both parties ultimately agreed that the potency of this report relied upon weight to be given by the Commission to the comments within the report. Second, Mr Hunt objected to the respondent's Application to Admit Late Documents dated 23 August 2019, however, after discussions this objection was withdrawn.
8. Third, there was a statement of Ms Cashion which was objected to by Mr Hunt because it was not signed. There was argument concerning probative value of such unsigned statements. I indicated to Counsel that I would allow the admission of Ms Cashion statement, although in the absence of signing it might carry less weight. Both parties were then content with that approach and in fact the respondent did not make any specific submissions, as the matter eventuated, relying upon Ms Cashion's statements.

9. 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.
10. In view of the fact that the issue was the potential operation of section 11A of the 1987 Act in which the onus was upon the respondent, Mr Robison agreed to make the first submissions.

EVIDENCE

Documentary evidence

11. The following documents were in evidence before the Commission and taken into account in making this determination:
 - (a) Application to Resolve a Dispute and attached documents (Application);
 - (b) Reply and attachments (Reply);
 - (c) Documents the subject of the respondent's Application to Admit Late Documents dated 23 August 2019;
 - (d) Workcover NSW – certificate of capacity concerning the applicant dated 5 August 2019 (Morpeth Family Medical Practice Pty Limited).

Oral evidence

12. No oral evidence was given.

THE RESPONDENT'S SUBMISSIONS

13. The respondent admitted psychological injury and the only issue is under the defence of section 11A of the 1987. It rests upon the letter.
14. The letter raises several workplace issues. The respondent says that the sending of the letter was reasonable. There are several complaints in the letter about the applicant's conduct. These include failures to behave appropriately and sexually orientated actions; the applicant was constantly on the telephone during her shifts. There are several more complaints outlined in the letter. The applicant was stood down but no final view was taken by the respondent about the various allegations. The applicant remained on full pay and it was indicated that an investigation would be completed in a timely manner.
15. The respondent owed global obligations not to breach any co-workers' confidences. The allegations were not put to the applicant in a final form.
16. The decision in *Insurance Australia Group Services Pty Ltd v Outram* [2019] NSWCCPD 44 (23 August 2019) (Outram) per DP Wood establishes that "reasonableness" of the employer's action must also be considered from the point of view of the respondent. In the case of sexual allegations, the relevance of

complainants being protected is heightened. The respondent's obligation to be reasonable is something less than an obligation to be perfect.

17. The causation issue, in terms of the words "wholly or predominately" requires an examination of the applicant's evidence, medical evidence and how the doctors apply that medical evidence. The question becomes whether the letter was wholly or predominantly causative of the applicant's injury.
18. The applicant's first statement mentions frustration, anger and that the applicant was "f...ing over it". This response by the applicant does not necessarily take on a psychological quality.
19. The applicant's second statement refers to depression due to bullying and harassment in other workplaces 17 and 10 years ago. It is only because the applicant was stood down (11 July 2018) that she had a major relapse. The applicant had predisposition to psychological injury by reason of events in 2001 and 2008. Part of the applicant's complaint is that she was upset about her co-workers' hate of the team leader, Ms Boyd. The rebellion by those co-workers was not directed to the applicant.
20. Part of the applicant's condition relates to grievances by co-workers. In her second statement the applicant said that these made her feel uncomfortable and distressed.
21. The applicant acknowledges that she had access to the Employee Assistance Program and opportunity for telephone counselling. Although on 23 May 2018 she was physically assaulted by a client, on receipt of the letter she was completely devastated.
22. The respondent's policy identifies the course to be adopted and there is a behavioural support plan in the policy.
23. In terms of the medical evidence, Associate Professor Robertson's report of 9 May 2019 does not properly engage with the applicant's history in that he was unaware of the "devastating effect" of the applicant's receipt of the letter. Dr Robertson noted that the applicant's mental state deteriorated from 2017 onwards.
24. Dr Bisht regarded the letter as the whole or predominate cause of the applicant's adjustment disorder with mixed anxiety and depressed mood. Dr Bisht noted that the applicant had no pre-existing condition at the time she received the letter. He thought that the predominate cause of the applicant's condition was receipt of the letter. Dr Bisht looked at the **comparative** psychological response of the applicant, whereas the other medical evidence has not.
25. Accordingly, the section 11A defence is enlivened.

APPLICANT'S SUBMISSIONS IN REPLY

26. Mr Hunt pointed out that the respondent's defence relies upon, wholly, the letter of 11 July 2018. However, the applicant's statement comprehensively sets out a number of matters from March 2018, including May 2018, where there were incidents of bullying.
27. The letter of 11 July 2018 sets out many allegations. There are no particulars of the allegations sufficient for the Commission to decide whether the respondent's actions were reasonable. The respondent offers no evidence as to how these allegations were considered, when and the detail of them. At best, the respondent can simply say that it investigated allegations.

28. In February 2019, the applicant provided a response to the various allegations. This is contained at pages 88-107 of the Application. There is no evidence from the respondent concerning how the applicant's responses were considered, nor when, nor the outcome of any such considerations.
29. The applicant's husband was an employee of The House with No Steps. The House with No Steps have a contract to provide certain services to the respondent. One allegation is that somehow this presented the applicant with a conflict of interests. This factual circumstance would not warrant any investigation, on any view of the matter.
30. The 8 March 2018 meeting triggered an investigation. The allegation was that a fellow employee (EE) had allegedly moved a patient into bed by thrusting at the patient's groin.
31. In terms of the letter, there is no evidence available from the various statements for the Commission to be possibly satisfied that the complaints in that letter were in any way reasonable. All of these complaints occurred against the background of the earlier bullying to which the applicant was subjected.
32. In terms of the 23 May 2018 meeting, the applicant was led to believe that the meeting was called concerning the general workings of the group home. She was not informed that her position was under threat, even though the respondent possessed statements taken from two employees (TA and EE) dated 7 May and 10 May 2018, respectively. Simply put, the applicant did not take a support person to this meeting as she did not realise what the meeting was about.
33. There is evidence from a fellow employee concerning awareness of allegations of bullying towards the applicant and on 24 June 2018, the applicant being assaulted by a client. On 25 June 2018, the applicant informed her doctor that she was being blamed for bullying. She was already on Lexapro at this time and the doctor discussed increasing the dosage of Lexapro and issued a Workcover Certificate for her.
34. The applicant's Team Leader, Ms B Boyd, confirms that the applicant was bullied before 11 July 2018. In fact, the applicant contacted the Employee Assistance Program on 27 June 2018. She then on 2 July 2018 approached her general practitioner seeking a clearance to go back to normal duties.
35. Despite the July 2018 certificate, many events had occurred before the applicant received her letter from the respondent dated 11 July 2018.
36. On 13 July 2018, the applicant saw Dr Wild. She complained of bullying and that the respondent had not acted to address her concerns. She mentioned the March 2018 meeting and questioned why she was now the subject of a bullying allegation.
37. On 18 July 2018, the applicant again consulted the Employee Assistance Program.
38. Regarding the respondent's reasonableness, there is simply no evidence of the truth of the allegations which the respondent made in the letter; there is no evidence that the respondent adopted a proper process to deal with these allegations; there is no evidence that the applicant's response to the allegations was ever considered by the respondent. All that the applicant received was a letter containing numerous allegations and asking the applicant to tell the respondent why her employment should not be terminated.

39. In relation to the medical evidence, there is a report of Dr Bisht dated 13 December 2018. Dr Bisht was provided with certain material but not the Employee Assistance Program records, nor the general practitioner records. Dr Bisht assumes that when the applicant received her general practitioner clearance on 2 July 2018 she was okay for work and everything was fine. Dr Bisht, however, gave no consideration to the prior meetings and events and did not have the benefit of prior records.
40. Dr Robertson, however, had before him the applicant's statements and had the benefit of the applicant's response to the letter. Dr Robertson also had a history of the applicant having been stood down from employment, the history of assault by a client and the history of the applicant being bullied by other workers. Dr Robertson also recorded the applicant's complaint that her problems commenced in March 2018. Dr Robertson obtained a history that the applicant's mental state deteriorated from as early as 2017. Dr Robertson was of the view that all of the applicant's experiences caused her ultimate injury.

RESPONDENT'S SUBMISSIONS IN REPLY

41. It is necessary to look at what happened in respect to the applicant's psychological condition in its totality. The merits of the matters raised in the letter to the applicant of 11 July 2018 are not relevant to the question of whether the respondent's action was reasonable, because an evaluation is necessary of the issue of reasonableness at the time the letter was written.
42. The expression "wholly or predominately" contemplates that there may be other potential causes of the applicant's condition. The fact that the applicant could go back to work as early as July 2018 is consistent with the cause of her condition occurring after that time.
43. It is difficult to support Dr Robertson's conclusion that the applicant's mental condition deteriorated from 2017 and onwards. This is because Dr Robertson did not have before him the general practitioner's notes.

FINDINGS AND REASONS

44. In terms of the applicant's prior adjustment disorders in 2001 and 2008, Dr Bisht on page 4 of his report of 13 December 2018 records that the applicant received no formal treatment. She had a few weeks off work and according to Dr Bisht "she recovered to a state of pre-injury function".
45. Both Drs Bisht and Robertson accept that the applicant's diagnosis is adjustment disorder with anxiety and depressed mood. Dr Robertson attributes this disorder to the applicant having been assaulted by a client under her care as well as a "pattern of bullying behaviour" which was the "main contributing factor to the evolution of her adjustment disorder and the exacerbation of her underlying eating disorder" (Dr Robertson report 7 May 2019 page 5).
46. Dr Bisht records the "initial onset of the condition" as 11 July 2018 (Dr Bisht report 13 December 2018 page 5). Dr Bisht nonetheless notes interpersonal problems with fellow staff members "but these episodes would be aptly described as normal emotional responses rather than a psychiatric condition". Dr Bisht's report does not specifically deal with the events which the applicant experienced in March and May 2018 nor the assault in June 2018. The assault it would appear happened on two occasions (Dr Bisht report page 2). To the extent that Dr Bisht does not specifically

address those incidents, but concentrates upon simply the receipt of the letter of 11 July 2018, the report is deficient in addressing the whole issue.

47. Although Dr Bisht focusses on the consequences of the letter, in discussing the prognosis he includes:-

“At the same, the worker has been having ongoing problems with her colleagues for about 2 years now, which will affect her vulnerability to relapse in the long term ie., she would be vulnerable to a relapse if she goes back to work with the same colleagues” (Dr Bisht report page 7)”.
48. It would appear that Dr Bisht is referring to “ongoing problems with her colleagues” from about December 2016 because he chooses the words “for about 2 years now”. It is, therefore, mildly surprising that Dr Bisht did not consider the extent to which those “ongoing problems” from December 2016 were causative of the applicant’s psychological condition. There is an implicit view in Dr Bisht’s report that the events in the last two years were of some relevance to the applicant’s prognosis. To that extent, put another way, why would Dr Bisht make that comment if the whole of the circumstances of previous two years had no relevance at all?
49. It follows that to the extent that Dr Bisht localises the onset of the condition to 11 July 2018 and dismisses the applicant’s prior employment experiences as “normal emotional responses”, this conclusion represents a bare ipse dixit. Dr Bisht fails to specifically consider the detail of the applicant’s experiences before July 2018 and so doing, there is a difficulty in the Commission accepting his opinion concerning causation.
50. It might be added that Dr Bisht had limited information in regard to the documentation the subject of review. Dr Bisht also it would appear relied upon, at least to some extent, the factual report of Lee Kelly Commercial Investigations dated 19 September 2018. The extent of that reliance is unknown, except to say there was reliance. Having regard to my earlier observations concerning the weight to be giving to an investigator’s conclusions, there is some added doubt about the correctness of Dr Bisht’s conclusions.
51. Dr Robertson’s opinion has the benefit of statements of the applicant dated 16 May 2018 and 27 August 2018, the applicant’s response to the respondent’s allegations and letters from the respondent dated not only 11 July 2018, but also 17 May 2018. Dr Robertson therefore had information concerning the applicant’s exposures in her employment which occurred before 11 July 2018. In those circumstances, I prefer the analysis of Dr Robertson, that is to say that the applicant’s assault by a client under her care, and a pre July 2018 pattern of bullying behaviour, is highly relevant to the onset of the applicant’s psychological condition. In arriving at this conclusion, I am also persuaded by the evidence of the applicant’s team leader, Ms B Boyd, who confirms the bullying behaviour before 11 July 2018 and the applicant’s contact with EAP on 27 June 2018. The receipt of the letter by the applicant is also contemporaneously recorded by Dr Wild, who the applicant saw on 13 July 2018. On that occasion Dr Wild recorded the applicant’s reaction to the March 2018 meeting, namely the rhetorical question posed by the applicant that she had been complaining about bullying and why was it the case that she was now the subject of a bullying complaint?.
52. Regrettably, the results of the investigation following the letter, if any, are not before the Commission. On one view, the results are irrelevant because I take the view that the applicant’s psychological condition was well-entrenched before her receipt of the letter. The applicant was criticised in the 23 May 2018 meeting. She did not take a

support person as she wasn't pre-informed that the meeting was largely about her. The respondent had in its possession statements taken on 7 May 2018 and 10 May 2018 but did not forewarn the applicant about the nature of the allegations nor her need to have someone present in support. The applicant saw her general practitioner on 25 June 2018 (Application page 213) and advised that she was being blamed for bullying. The applicant was already taking Lexapro, the increase in the dose of Lexapro was discussed and a Workcover Certificate was issued.

53. On any proper view of what happened, it is the Commission's conclusion that there were a series of adverse exposures of the applicant to bullying conduct before 11 July 2018 and that the applicant had consulted her medical advisors in that regard. A discussion concerning increasing the dose of Lexapro is consistent with the applicant experiencing increased anxiety and/or depression at least from 25 June 2018. This happens to coincide very closely with the assault on the applicant on 24 June 2018.
54. I do not place much weight upon the applicant's request to her general practitioner of 2 July 2018 for a clearance to enable her to go back to duties. There could be any number of reasons why the applicant wanted to return to work and there is no evidence before the Commission to explain which reason or reasons were prevalent in her mind at that time.
55. I accept that the applicant was in fact "devastated" when she received the letter. However, it is necessary to consider this reaction in its proper context. It is necessary to compare the applicant's reaction to the letter with events which had already occurred (*Insurance Australia Group Services Pty Limited v Outram* [2019] NSWCCPD 44 per DP Wood at [172]) and this was the comparison which Dr Robertson made. The question of "reasonableness" comes down to an evaluation of whether the manner in which the respondent effected action was fair (*Ivanisevic v Laudet Pty Ltd NSWCC*, Truss J, 24 November 1998, unreported; *Irwin v D G of School Education, NSWCC*, Geraghty J, No 14068/97, 18 June 1998, unreported).
56. The respondent pins its case on the letter. The letter includes very serious allegations. The respondent's onus is not only to show that the letter was the wholly or predominate factor in causing the applicant's condition, but that the letter itself and the surrounding circumstances at the time were "reasonable". The respondent has not produced any evidence of the manner in which it was made aware of quite serious allegations. Nor does it proffer any particulars that might support the allegations, nor any evidence of the process followed by the respondent. The allegations number about 18 complaints. Human experience would suggest that the respondent ought reasonably have embarked upon an investigation and instigated discussions with the applicant before issuing what seems to be an extensive and serious compendium of historical complaints.
57. I am not satisfied that the applicant's psychological condition was wholly or predominately caused by reasonable action taken or proposed to be taken by the respondent in respect of performance appraisal or discipline. My conclusion is that there were a considerable number of incidents which occurred quite apart from the letter of 11 July 2018 and that these other incidents were significant in that they required the applicant to seek medical treatment before 11 July 2018. If I am incorrect in this regard, I conclude that the issue of the letter, in the context of what had occurred earlier in 2018 (including meetings, the applicant's own outstanding complaint) was not reasonable action on the part of the employer. The employer had available to it a number of alternative approaches. It did not properly meet with the applicant before deciding whether to suspend her employment. It did not seek the applicant's explanation before committing to writing very serious allegations, including

allegations of sexual impropriety. There is no evidence that it had regard to the context in which the allegations had surfaced and considered the applicant's own complaints of bullying, supported by her superior, Ms Boyd. Accordingly, if I am incorrect in concluding that the applicant's condition was not wholly or predominately caused by action taken or proposed to be taken by the respondent in respect of performance appraisal and/ or discipline, so that the letter was a cause, my view is that the background circumstances leading up to the issue of the letter were causative of the applicant's psychological condition and did not constitute reasonable action on the part of the employer.

58. The respondent's section 11A defence fails.

SUMMARY

The following awards are made:

59. Award in favour of the applicant against the respondent in respect of weekly payments of compensation pursuant to section 37(1) of the 1987 Act in the sum of \$1,163.20 per week from 5 July 2019 to date and continuing.
60. A general award is made in favour of the applicant in respect of section 60 expenses.

