

WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: 4139/19
Applicant: Amanda Thompson
Respondent: State of New South Wales
Date of Determination: 6 December 2019
Citation: [2019] NSWCC 391

The Commission determines:

1. The applicant's injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to performance appraisal and/or discipline pursuant to s 11A(1) of the *Workers Compensation Act 1987*.
2. The applicant is entitled to payments of weekly benefits for the following periods pursuant to s 37(1)(a) of the *Workers Compensation Act 1987*, with credit for any payments already made and subject to s 50:
 - (a) 20 to 21 June 2018;
 - (b) 12 to 28 September 2018, and
 - (c) 7 December 2018.
3. The applicable PIawe figure is \$1,359.69, as periodically indexed pursuant to s 82A of the *Workers Compensation Act 1987*.
4. In respect of the period 14 to 31 August 2018, the respondent has liberty to file consent orders agreed by the parties or alternatively make submissions as to the applicant's incapacity and quantum of her entitlement to weekly benefits within seven days of being notified of this determination. The applicant has liberty to file any submissions in reply within a further seven days.
5. The respondent to pay the applicant's reasonably necessary medical expenses pursuant to s 60 of the *Workers Compensation Act 1987*, upon production of accounts, receipts and/or valid Medicare notice of charge.

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.

S Naiker

Sarojini Naiker
Senior Dispute Services Officer
As delegate of the Registrar



STATEMENT OF REASONS

BACKGROUND

1. Ms Amanda Thompson (the applicant) was employed by the State of New South Wales (the respondent) as a primary school teacher at Leumeah Public School. The applicant claims to have sustained a psychological injury arising out of bullying and harassment and interpersonal conflict, including the failure to facilitate completion of a teacher improvement program at another school. The applicant relies on a deemed date of injury of 8 August 2017.
2. The respondent accepted that the applicant sustained a psychological injury arising out of employment but, on 19 August 2018, issued a notice pursuant to ss 54 and 74 of the *Workplace Injury Management and Workers Compensation Act 1998* (the 1998 Act) notifying the applicant of a decision to dispute liability to pay compensation. The respondent relied on s 11A(1) of the *Workers Compensation Act 1987* (the 1987 Act), saying that the injury was wholly or predominantly caused by reasonable actions taken or proposed to be taken by or on behalf of the employer with respect to performance appraisal and/or discipline.
3. The present proceedings were commenced by an Application to Resolve a Dispute (ARD) filed in the Commission on 15 August 2019. The applicant sought compensation in the form of weekly benefits from 20 to 21 June 2018 and 13 to 20 September 2018 as well as past and future medical expenses.

ISSUES FOR DETERMINATION

4. The parties agree that the following issues are in dispute:
 - (a) Whether the applicant's 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 performance appraisal and/or discipline pursuant to s 11A(1) of the 1987 Act;
 - (b) Quantification of any entitlement to weekly benefits, and
 - (c) The applicant's entitlement to medical expenses.

PROCEDURE BEFORE THE COMMISSION

5. The matter was listed for teleconference on 12 September 2019. The parties were unable to reach agreement and the matter was fixed for conciliation conference and arbitration hearing. On 23 September 2019, the applicant filed an Application to Admit Late Documents (AALD) including an Amended Application to Resolve a Dispute. The amended application included a schedule of earnings indicating that weekly benefits were now sought for the following periods:
 - (a) 20 to 21 June 2018;
 - (b) 14 to 31 August 2018;
 - (c) 6 to 28 September 2018, and
 - (d) 7 December 2018.
6. The parties appeared for conciliation conference and arbitration hearing on 9 October 2019. The applicant was represented by Mr Paul Stockley of counsel, instructed by Ms Susan McTegg. The respondent was represented by Ms Lyn Goodman of counsel.

7. The parties spent a long period in conciliation but were unable to agree on terms of settlement. An arbitration hearing was unable to be completed within the time available and the matter was adjourned. A direction was made to the parties to serve any amended schedule of earnings and material with respect to the applicable pre-injury average weekly earnings (PIAWE) figure on, or before, 23 October 2019 and to file it in accordance with r 10.3(3)(c) of the Rules.
8. On 23 October 2019, the applicant filed a further AALD including a schedule of earnings seeking weekly benefits for the same periods identified in the amended ARD and claiming a PIAWE figure of \$1,491.32. No further evidence was filed by the respondent.
9. At the resumed conciliation conference and arbitration hearing on 5 November 2019, the applicant confirmed that the relevant periods in which weekly benefits were sought were as follows:
 - (a) 20 to 21 June 2018;
 - (b) 14 to 31 August 2018;
 - (c) 12 to 28 September 2018, and
 - (d) 7 December 2018.
10. The respondent indicated that the period 14 to 31 August 2018 had not previously been claimed and it was not in a position to respond to the applicant's claim in respect of those dates.
11. After some discussion, it was agreed that leave could be granted to the applicant to amend the claim for weekly benefits in the ARD, with liberty granted to the parties to make submissions in respect of those dates, in the event of a favourable determination for the applicant.
12. I am satisfied that the parties to the dispute understand the nature of the application and the legal implications of any assertion made in the information supplied. I have used my best endeavours in attempting to bring the parties to the dispute to a settlement acceptable to all of them. I am satisfied that the parties have had sufficient opportunity to explore settlement and that they have been unable to reach an agreed resolution of the dispute.

EVIDENCE

Documentary evidence

13. 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 AALD filed by the applicant on 2 September 2019;
 - (d) Documents attached to an AALD filed by the applicant on 23 September 2019, and
 - (e) Documents attached to an AALD filed by the applicant on 23 October 2019 apart from a Casual Teacher Report for the period 1 February 2019 to 13 October 2019.
14. Neither party applied to adduce oral evidence or cross examine any witness.

Applicant's evidence

15. The applicant's evidence is set out in written statements made by her on 17 September 2018, 7 August 2019 and 23 August 2019.
16. The applicant completed her teaching qualifications in October 2014. During her final year of study, the applicant performed casual teaching work at a number of primary schools, including a three-term position at Leumeah Primary School. A graduate position was advertised at the school and the applicant applied for and was offered the permanent role in October 2014. The applicant achieved her accreditation at the proficient level in March 2015. Evidence of the applicant's accreditation was included in the ARD.
17. During her time as an early career teacher at the school, the applicant taught Years 3, 4, 5, and 6. In 2017, the applicant was given the opportunity to develop her skills in "ES1" (Kindergarten). The applicant said she had no issues with her teaching and only ever received positive and encouraging feedback until 2016 when a new executive team was appointed.
18. On Friday 27 May 2016, the applicant received an email from the school's Principal, Ms Kerry Wood, asking to talk to her about the content of some entries the applicant had logged in a database. The applicant felt concerned that she had done something wrong and felt anxious all weekend. Two emails from the applicant to Ms Wood expressing her concerns in this regard are in evidence.
19. On 19 August 2016, the applicant emailed Ms Wood asking her to be a referee for a teaching position at another school. Ms Wood emailed a response which said, "Can we talk about your job application tomorrow some time please?" The applicant said she perceived from tone of this email that Ms Wood was not happy with her. This heightened her anxiety.
20. In February 2017, the applicant's supervisor, Ms Ashlyne Bull, asked her to redesign her maths program so that it looked and felt the same as hers. The applicant responded that at that point she was focused on learning to program guided reading groups and asked if she could redesign the next lot of programming in the preferred format. On Sunday, 26 February 2017, Ms Bull emailed the applicant stating that she had some issues she needed to discuss with the applicant and asking her to meet the following morning before school.
21. The applicant claimed that thereafter, she was subject to regular impromptu meetings conducted by Ms Bull, the Deputy Principal, Ms Kristy Hill, and Ms Wood. The applicant said the meetings were conducted in an interrogating manner and caught her completely off guard, resulting in her feeling deeply anxious all of the time.
22. On 27 February 2017, Ms Bull directed the applicant to undertake all of her programming in her presence to ensure that programs were in the preferred formatting.
23. On 17 March 2017, Ms Hill spoke to the applicant about sick leave. At that point, the applicant had taken one day of FACS leave to look after her son and two days of sick leave for the year.
24. On 26 March 2017, the applicant emailed Ms Wood asking if she would support an application for teaching position at a primary school closer to her home. The applicant did not receive a response and sent a further email asking for her support on 28 March 2017.

25. On 28 March 2017, Ms Wood came into the applicant's classroom and began to "interrogate" her around the leave taken to look after her sick son. Ms Wood asked the applicant why she did not call on her mother to help out. The applicant was too embarrassed to tell Ms Wood that her mother was an alcoholic and so she could not call on her help. The applicant felt belittled and humiliated. The same day, Ms Wood stated that she would not support the applicant's application for a teaching position at the school closer to her home.
26. On the same day, Ms Bull informed the applicant that she was going to undertake formal teaching observations. This was arranged by Ms Wood and the applicant felt it was designed to intimidate her. Ms Wood had never observed the applicant teaching and so she had difficulty understanding why Ms Wood had developed concerns about her teaching.
27. The applicant believed that she was about to be placed on a Teacher Improvement Program (TIP) and sent an email to the school indicating that she was appealing the proposed TIP. The applicant expressed concern about the "nit picking" to which she was exposed and indicated that she would provide evidence of the teaching standards she had employed.
28. The applicant became increasingly concerned that her teaching and professional reputation was under threat. The applicant contacted the New South Wales Teachers Federation to obtain advice, and was allocated a professional support officer, Ms Jenny Moes. An email sent to Ms Moes dated 30 March 2017 reads,

"Hi Jen,

Thank you for your email and I feel so comforted knowing that you are helping me work through this situation.

I sent a number of emails yesterday to my Principal and the other people involved in the Tuesday meeting and as such they have now decided that they will not meet with me at this stage tomorrow and will continue to observe me.

These are the emails I sent below. You can see I was up very late with this and did not get much sleep. I am now spending tonight gathering my evidence and annotating it to the standards and quality teaching framework."

29. On 30 March 2017, Ms Bull conducted a formal observation of the applicant's literacy teaching.
30. On 31 March 2017 Ms Wood emailed the applicant stating that she had not been placed on a TIP. The email, was expressed as follows:

"Hi Amanda

Thank you for contacting me via email on the 29.3.17 at 10.32 and 10.53 pm, Today I have sent you copies of the minutes of our meeting 28.3.17 taken by Annette and Ashlynn. Thank you for letting Ashlynn visit your classroom yesterday and today.

I would like to clarify that at this time you haven't been placed on a Teacher Improvement Program. Our aim is to provide support to enable you to meet the teaching standards.

While the issue of the maths programming has been resolved, I am concerned about aspects of your practice in Standard 1: Know students and how they learn, Standard 2: Know the content and how to teach it and Standard 3: Plan for and implement effective teaching and learning. An important part of support is classroom observation and feedback. I'd like to meet with you and Ashlynn to talk further about the support and what it will look like. We can also reconsider the timeframe for support.

We are genuinely wanting to ensure your success in the classroom, strongly encourage you to engage with Ashlynn and the support offered. I mentioned the Teacher Improvement Program as a possibility if sufficient improvement is not made."

31. The applicant felt no doubt that her teaching was under observation and felt the email was a threat to place her on a TIP. The applicant felt increasingly anxious about the ongoing observations, and felt she was being micromanaged and targeted. The applicant perceived that Ms Wood was using the performance management processes to intimidate and bully her.
32. In May or June 2017, Ms Hill removed the applicant from the school assembly in front of students, teachers and parents. Ms Hill did not tell the applicant why she did this or what she needed the applicant for. The applicant said Ms Hill took her into her classroom shut the door and spent an hour interrogating her about comments and grades she had given some of the students in their academic reports. Ms Hill “trawled through” the students’ work samples. Eventually, Ms Hill agreed with almost all the comments and grades.
33. Ms Bull continued to conduct formal observations of the applicant’s literacy teaching throughout May 2017. On 27 May 2017 the applicant was informed that Ms Bull, Ms Hill and Ms Wood were going to meet the following Friday to discuss the outcomes of the observations. The applicant was informed on 29 May 2017 that Ms Bull wished to do more observations.
34. On 2 July 2017, the applicant informed Ms Moes that she felt constantly monitored and subjected to excessive surveillance and criticism. The applicant told Ms Moes that she felt like she was being bullied, unsafe and trapped.
35. On 27 July 2017, Ms Wood performed an observation of the applicant’s literacy teaching.
36. On 3 August 2017, the applicant received a formal letter from Ms Wood informing her that she had determined that the applicant was having teaching difficulties and was being placed on a TIP. Following a meeting the same day, the applicant self-harmed.
37. On 7 August 2017, the applicant attended a formal TIP meeting. Directly after the meeting while attempting to debrief with her support person, the applicant collapsed onto the classroom floor in a heightened emotional state. No medical treatment was provided.
38. The applicant consulted her general practitioner, Dr Touma, and commenced treatment with a psychologist. The applicant made a worker’s compensation claim.
39. On 5 October 2017, the applicant submitted a “TIP dispute” to Ms Wood. On 17 October 2017, Ms Wood responded that she had decided not to accept the TIP dispute and would manage the document as a complaint. The applicant said this was a longer process than the TIP dispute process. The applicant perceived that Ms Wood was maliciously dragging out a reasonable resolution and this was exacerbating her psychological injury further.
40. On 6 November 2017, the applicant was informed by Ms Wood that the concerns raised in her “complaint” were not supported.
41. As part of a return to work plan composed by the applicant’s rehabilitation consultant, the applicant was provided with mentoring by a qualified instructional leader at a neighbouring school. The applicant worked with the mentor for four days.
42. On 29 March 2018, Dr Touma issued the applicant with WorkCover certificate including a restriction “can have a TIP done under different executive by a qualified instructional leader”.
43. The applicant returned to work four days per week in 2018. The applicant had a support teacher full-time for the first four weeks of term one. From week five onwards, the applicant worked five days per week.

44. On 21 May 2018, the applicant began the TIP. Ms Wood observed the applicant teach a lesson on 23 May 2018. An account of a meeting between the applicant and Ms Wood after the observation by the applicant's support person, Ms Annette Wilson, states:
- "On Wednesday 23.5.18, whilst on RFF in the staffroom, Kerry Wood approached me just before to beginning of recess and asked me if she could see me at recess. When the recess bell rang Kerry came and asked me if she could see me. As I walked to the office she asked me quietly to walk to Amanda's room with her because she was concerned about Amanda after her lesson. She said that Amanda didn't seem herself and she was worried about her. When we entered Amanda's room she was sitting down on her teacher's chair at the front of the room going over her lesson notes and was annotating her lesson plan. When Amanda saw us enter the room she asked what was wrong. Kerry said that she was worried about Amanda's health, because she didn't seem herself. Amanda said that she didn't think her lesson was that bad. Kerry explained that it wasn't really about the lesson and that she was concerned about her health. Amanda was very concerned that she would be 'marked down' on her lesson and she tried to continue to annotate her lesson while she was talking. Kerry gently took the notes from Amanda's hands and put them on the computer desk. Kerry told Amanda that she didn't feel that she was very well and asked if she had been in contact with her doctors and if she had spoken to them recently. Kerry said that one of Amanda's doctors hadn't heard from her for a while. Amanda replied that she had spoken to one of her doctors recently. Kerry suggested that Amanda go to her office and call her doctor."
45. On 23 May 2018, Dr Touma changed the restriction on the applicant's WorkCover certificate to read,
- "...can have TIP done under different executive and as agreed in conference meeting, Kerry Woods not be part of the TIPS."
46. On 24 May 2018, the applicant sent an email to the Employee Performance and Conduct (EPAC) directorate overseeing the TIP. The applicant said that she was happy to participate in the TIP but was concerned about bullying and harassment she was experiencing from the executive at Leumeah Public School. The applicant received an email in reply informing her that the implementation of a TIP was led by the school's principal. If she was fit for work, the applicant was expected to participate in the TIP. Around this time, the Department withdrew suitable duties and the applicant was not attending work.
47. On 18 June 2018, SIRA attended the school to find out why it was asserted that there was no work for the applicant. The applicant received an email from the SIRA inspector stating that three options had been suggested to the Department, being: do the TIP at another school; do the TIP under different executive at the same school; or non-teaching admin work.
48. The applicant was keen to maintain her career as a teacher and felt she had no option other than to try to undertake the TIP at Leumeah Public School. It was agreed that the applicant would do the TIP at the school but with two independent observers. The applicant understood that on the occasions she would be observed by Ms Wood she would be shadowed by another independent observer.
49. The TIP was completed after five weeks on 10 August 2018 and included 12 lesson observations, assessments of teaching and learning programs, a weekly overview and assessment of communications to parents and the assessment and reporting processes.

50. The applicant said the feedback provided to her was that she was taking on feedback adequately and modifying teaching to align with the feedback. As a result, the applicant was “in a state of absolute disbelief” when she was told by Ms Wood that it was her determination that the applicant did not demonstrate consistent improvement. The applicant was surprised that none of the other observers were included in this decision. The applicant said Ms Wood had changed the standard required to complete the TIP from “improvement” to “consistent improvement”.
51. The applicant said Ms Wood conducted formal review meetings within the TIP in an interrogating manner. On one occasion, the applicant expressed concern that Ms Wood was accusing her of sending excessive emails. The applicant felt Ms Wood was using the TIP to intimidate, bully and threaten her.
52. On 8 August 2018, the entire school staff participated in mandatory professional development on “the five dysfunctions of a team”, presented by Ms Hill. The participants were instructed to share something personal about themselves or experiences affecting their lives. This was part of a vulnerable trust activity. The applicant said she was already feeling extremely vulnerable in her situation at the school. The applicant was being treated for a psychological injury and in the midst of the TIP. As the session went on, the applicant continued to feel extremely uncomfortable and emotional, the applicant could not hide her tears and felt humiliated by being forced to take part in the session. The applicant ended up running out of the room in tears and collapsing. Ms Wilson followed the applicant out and became so worried that she went to get Ms Wood. Ms Wood asked her to wait until she had a chance to share her personal story with the group. No medical attention was offered or provided.
53. The next day, the applicant had her final teacher observation by Ms Wood and a formal review meeting. The applicant felt she had no choice but to return to school in order to complete the last teaching observation. During the review meeting, Ms Wood stated that when she came into the classroom during open classrooms, the class were doing an activity that was not on the weekly overview. Ms Wood criticised the applicant’s choice of stickers placed on the student work samples. Ms Wood felt the use of a sticker stating, “excellent work” where the student did not get many of the questions correct was a poor choice because she did not consider the students work was “excellent”. The applicant felt the student’s attempt to complete the work had been excellent.
54. The applicant’s confidence was undermined. The applicant felt no issue was too small for Ms Wood and that nothing she did was correct. Ms Wood asked the applicant about an alleged breach of confidentiality in relation to a class party. The applicant was also accused of placing lesson plans on social media to get feedback, which the applicant denied. The applicant felt under attack, anxious and exhausted.
55. The applicant was due to participate in the TIP determination meeting on 15 August 2018. The night before the meeting, the venue was changed by Ms Wood to the District Office. Ms Wood refused to let the applicant’s husband participate in the meeting as a support person as Ms Wilson was already there. The applicant felt intimidated and uncomfortable.
56. Ms Wood started the meeting by asking the applicant how her students had come to understand that her teaching was being observed and accused the applicant of instructing her students to behave in a certain way. The applicant was accused of breaching confidentiality about the TIP. Ms Wood accused the applicant placing her students’ well-being at risk by raising their anxiety. The applicant said there was no evidence to support these allegations and Ms Wood did not stop to consider that the students may have overheard the verbal feedback provided during the last observation. The applicant felt demeaned and attacked.

57. Ms Wood insinuated that there was a child protection situation occurring as a higher than average number of students from the applicant's class were coming to the sick bay. This was the first time this had been mentioned and the applicant felt she was being accused of something extremely serious. Due to where she was seated in the room, the applicant felt trapped. The applicant saw Dr Touma on 16 August 2018 and was certified unfit for work for two weeks.
58. On 30 August 2018, Dr Touma certified the applicant as fit for work with the restriction, "not at Leumeah Public School".
59. In early September 2018, the applicant made a staff complaint in relation to Ms Wood. An independent mediation between the applicant and Ms Wood was arranged. On 25 September 2018, the applicant received an email with a document attached communicating that her complaint was not upheld. Ms Wood was now composing a formal report which indicated that it was her decision that the applicant did not meet the standards required to hold the position of a primary school teacher. On 26 September 2018, the applicant emailed EPAC asking for advice about how to transfer to another school. The applicant was told that a transfer could not be offered as Ms Wood declined to approve it. The applicant was told that an application for leave without pay to work at a different school had also been declined.
60. The applicant was instructed to present to the Glenfield Office for administrative duties on 19 October 2018. The staff at the office had no idea the applicant was coming and nothing had been prepared for the applicant, including a workspace. The applicant spent a large amount of the morning sitting in the waiting room. Her anxiety and depressed state worsened. Eventually, the site supervisor arrived, explaining that he had not been expecting the applicant. The applicant felt completely humiliated and awkward. The applicant said that over the next two weeks she was not provided with any work at all despite asking numerous times. The applicant said she was placed in an office area where other teachers, who were being investigated for criminal conduct, were completing their alternative duties. One of the teachers sitting next to the applicant was having a nervous breakdown on a daily basis, crying loudly and cutting her hair off while she sat at the desk.
61. On 2 November 2018, the applicant received an email from HR payroll stating that she had been overpaid in two pay periods and she was to pay back a debt of \$1,355.61. The overpayment occurred during periods when the applicant was unfit for work by reason of her injury, being 20 June 2018 to 21 June 2018 and 13 September 2018 to 20 September 2018. The applicant later received an email from HR payroll thing they were acting on advice provided to them by Ms Wood who had sent a form indicating that those dates were taken as "sick leave no pay".
62. On 5 December 2018, the applicant was shown a letter from Mr Mark Anderson at EPAC stating that disciplinary action would be enforced against the applicant rather than remedial action and he was considering:
 - (a) a caution or reprimand;
 - (b) the imposition of a fine;
 - (c) reduction of salary or demotion to a lower position;
 - (d) direction to resign or being allowed to resign within a specific period, or
 - (e) dismissal and placing the applicant's name on the "not to be employed list".
63. The applicant experienced an emotional breakdown as a result of reading the letter and took two days of paid sick leave.

64. The applicant indicated to Mr Anderson that she did not wish to resign. On 17 December 2018, Ms Moes contacted the applicant by telephone. Ms Moes explained that Mr Anderson had spoken to her and indicated that if the applicant did not resign, he would direct her to resign. Mr Anderson would not place the applicant's name on the not to be employed list if the applicant resigned within the next 24 hours. The applicant was asked to sign a deed which permitted her to teach casually/temporarily subject to conditions including a requirement to submit two principal's reports from the schools at which the applicant completed the majority of her casual teaching work within the next 12 months. The applicant felt devastated and coerced. On 17 December 2018, the applicant submitted a written resignation with a request for approval to work in a casual/temporary capacity as a teacher.
65. The applicant commenced work at Robert Townson Public School as a casual teacher on 28 January 2019. The applicant said her new position was going very well and the applicant was demonstrating great success and proficiency in all standards on a daily basis under the mentorship and support of the Principal, Deputy Principal and Stage III supervisor at the school. The school wished to provide the applicant with a contract in order to complete the remainder of the year with her class.

Evidence from the applicant's treating practitioners

66. The first medical certificate provided by the applicant was a general certificate issued by Dr Mohammed Al Hairi dated 8 August 2017, indicating that the applicant had depression and anxiety stemming from workplace stresses.
67. WorkCover certificates covering the periods in which weekly compensation is claimed initially indicated that the applicant had capacity for suitable employment at normal hours with the following restriction,

"can have TIP done under different executive and as agreed in conference meeting, Kerry Woods not been part of the TIPS can do normal teaching as usual".

From 14 to 31 August 2018, the applicant was certified as having no current work capacity. From 1 September 2018, the applicant was certified as fit for pre-injury duties with the restriction, "not at Leumeah Public School". On 6 and 7 December 2018 the applicant was certified as having no current work capacity.

68. An email from the applicant's psychologist, Ms Mariel Gadea, dated 20 October 2017 to an Injury Management Adviser at the Department of Education and Training (the Department), Mr Jason Ji, indicated that the applicant's mood needed to stabilise before she could participate in a worksite meeting with her principal to discuss her return to work. Ms Gadea said the applicant had suicidal ideation and was having to ingest Valium during their sessions when they talked about what happened at school. A complaint about the TIP had been lodged and there had not yet been a response.
69. On 13 February 2018, Ms Gadea wrote to Dr Bisht stating:

"I have been counselling Amanda in relation to bullying and harassment in the workplace. Amanda was placed on a performance management tip and consequently self-harmed the day before a meeting with her principal and the meeting continued regardless. Amanda is currently ingesting Zoloft 100mg she is continually experiencing panic attacks and has returned to 5 days a week teaching. The expectation from the school is that Amanda complete the tip in two weeks' time. Amanda is in a heightened state of anxiety and in my opinion is not psychologically resilient yet to complete a performance review effectively. I believe if she is given more time to prepare herself this full term and her tip is completed at the beginning of second term, she will be able to succeed in her performance review. She is experiencing flashbacks to the bullying, night terrors of the bullying and failing at school as well as regular panic attacks."

70. An email from Ms Gadea to Mr Ji, dated 4 April 2018 expressed support for the applicant to be managed by another executive as she had been bullied by the current executive including the principal who failed to call an ambulance when the applicant collapsed at school and who had pursued a performance meeting when the applicant had advised her that she had self-harmed. Ms Gadea said she was “appalled by the dogmatic determination to continue to place Ms Thompson in an unsafe and risky situation regardless of the advice provided by her treating practitioners.”

71. On 22 August 2018, Ms Gadea wrote to the Department with regard to the applicant's TIP dispute, stating:

“I wish to inform you of several occurrences in the management of this rehabilitation program which have been poorly managed and have contributed to the deterioration of Ms. Amanda Thompson's current psychological capacity and caused her further injury. Firstly Ms. Thompson has been medically certified as being unfit to return to work as she has suffered a new psychological injury from her participation in a workplace professional learning course on the 5 disfunctions of a team run by the same executive management team she reported allegedly bullied her. Ms Thompson is not in a fit psychological state to formulate a dispute response.

...

Secondly the Teacher Improvement Program was conducted by the same executive management team and the Principal which Ms. Thompson and I and her Treating Doctor, Dr. Ben, her Treating Psychiatrist Dr. Bisht medically recommended against this occurring. The Department of Education rehabilitation case Manger Mr. Jason Ji advised that the Teacher improvement program could not proceed under a different management team at a different school Ms. Thompson was further psychological affected as she felt professional bullied and left without resource to maintain her Teaching job unless she submitted to being assessed by the people that bullied her.

...

It is very clear that Ms. Wood has taken a professional and personal dislike to Ms. Thompson and systemically acted in a professionally bullying manner utilising her position of authority to undermine and intimidate Ms. Thompson prior to the TIP commencement and throughout the TIP process. This was clearly indicated by the mobbing type meeting organised in the District Office, her continued feedback of professional development as part of the TIP in front of children. The active interviewing of Ms. Thompson's students to gather negative feedback about Ms. Thompson. The way the allegations of child protection were raised with Ms. Thompson appears to be an attempt at professional sabotage to incite an emotional reaction to affirm her allegation that Ms. Thompson is unfit to be a Teacher and have her fired from the Department of Education.

As part of Ms. Thompson's medical care team I never supported that the TIP be conducted with Ms. Wood or by this Executive Team, I also never supported her return to complete this TIP at this school and strongly advocated in writing, in case conferences to all parties including the Department of Education that this was a very risky decision to pursue as it would psychologically impact detrimentally on Ms. Thompson. However, it was the Department of Education's decision to not find an alternate observation team or observation school for this TIP to be conducted in a fair and safe return to work.”

72. Ms Gadea prepared a detailed report for the applicant's solicitor, dated 19 November 2018. Ms Gadea's report provided a history of events broadly consistent with the applicant's own evidence. Ms Gadea provided an opinion as follows:

"I am of the opinion that she was systematically bullied prior to the TIP and that the TIP performance management procedures were then utilised against her to formulate a case of incompetency of which she had little recourse. She was bullied by her employer to return to complete the TIP under the same management and they offered no alternative accommodation aside from an appointment of one independent delegate as part of the TIP assessment only after several discussions and requests from her managing allied health team."

73. Further,

"In Mrs. Thompson's case she experienced workplace bullying initially over a difference of opinion on a layout of work, and subsequently because she was trying to juggle being a mother to her 9-year-old son and took 3 days leave. She was identified as not competent and derelict of her teaching responsibilities. Following a request for a transfer after only 8 weeks under the new executive management team as she was already feeling anxious, isolated, singled out and stressed she was repeatedly called into meetings and multiple observations without explanation as to why she was being observed or how she was being measured. She was then placed on a performance management program known as a TIP. She reported feeling belittled, humiliated and distressed to the point of collapse and self-harm and even after disclosure of herself harm for which she was shown very little care if any. For these reasons I believe Mrs. Thompson's case meets the criteria for workplace bullying, both covert and overt. Professional mobbing was evident in her final review meetings and there were elements of sabotage in her TIP review briefings."

74. The applicant's general practitioner, Dr Touma, prepared a report for the applicant's solicitor on 14 November 2018 indicating that ongoing bullying at the applicant's workplace had affected her life, relationships, and caused fear and depression with self-harm from 2017. The applicant was fit to perform suitable duties at an alternate location with management by an alternate supervisor.

75. The applicant's treating psychologist, Dr Yajuvendra Bisht prepared a report for the applicant's solicitor dated 15 July 2019. Dr Bisht gave a diagnosis of adjustment disorder with mixed anxious and depressed mood, stating:

"Amanda developed symptoms of adjustment disorder in the context of her workplace stressors i.e. being bullied by her head teacher in her previous school, from 2017 onwards. The bullying reported by Amanda included exclusion and over criticality (including following improper process with the performance improvement plan). As a result, she experienced gradually worsening psychiatric symptoms, which reached their peak towards the end of 2018."

76. Dr Bisht agreed that the applicant had capacity to perform her pre-injury role and pre-injury hours but not at the same location.

Applicant's other evidence

77. A letter from Injury Management Advisor, Mr Ji, dated 24 May 2018, addressed to the applicant stated that Mr Ji had been,

"...unsuccessful in sourcing appropriate suitable duties in line with your current medical restrictions. I have been in contact with your nominated treating doctor, Dr Benjamin Touma to confirm your fitness for work. Dr Benjamin Touma confirmed you have the following medical restrictions:

- Can have TIP done under different executive as agreed in conference meeting. Kerry Wood not be part of the TIP"

78. Email correspondence from SafeWork NSW to Mr Ji, dated 5 June 2018, requested a meeting to discuss suitable duties for the applicant and reminded him of the statutory obligation on the employer to provide evidence as to why it is not reasonably practicable to provide such duties.
79. An offer of suitable duties was formally made in writing by Mr Ji, on 19 June 2018 as follows:
- “The Department formally offer the following suitable duties program for Mrs Thompson:
- Work at Leumeah Public School - 7 hours per day/5 days per week.
 - Commence Teaching Improvement Plan
 - To have two (2) independent observers:
 - Ms Suzanne Crouch, Principal Schools Leadership, Glenfield to conduct independent observations for the duration of the TIP.
 - Ms Kylie McKeon, independent advisor, Schools Services.
 - Ms Kerry Wood remains in the position to oversee the program.”
80. A number of Return to Work plans and character references for the applicant are also in evidence.

Dr Martin Allan

81. The applicant relies on medicolegal reports prepared by consultant psychiatrist Dr Martin Allan, dated 31 May 2018 and 20 June 2018.
82. Dr Allan took a history that all of the applicant’s issues arose after the executive changes at school. The applicant explained that the entire executive team including a new Deputy Principal and Principal arrived at her school. In early 2017, the applicant was placed in charge of a kindergarten class and given a supervisor who had not taught kindergarten previously and had only four years of experience herself. The applicant alleged that the supervisor was not happy with the applicant’s teaching style and disagreed with the grades she was giving. The applicant felt targeted by a group of bullies who were close to each other in the executive. The applicant felt she was targeted because she had worked hard to get a permanent position and there were people who were jealous. A teacher improvement plan had been hanging over her since early 2017. The applicant made repeated reference to Ms Wood in causing ongoing issues. The applicant’s health deteriorated over the course of the year to the point whereby around August she was stressed, depressed and anxious, socially withdrawn, and experiencing insomnia, night terrors and panic attacks.
83. Dr Allan noted that the applicant had been prescribed 100 mg daily of sertraline since April 2017. Dr Allan opined:
- “Her symptoms of distress, anxiety, depression, sleep disturbance, altered energy, social withdrawal, ruminative thoughts and occasional night terrors appear to be attributable to the stress she has perceived in her workplace since early 2017. She feels she has been bullied, harassed and mistreated. She feels the teacher improvement plan is something she is able to go along with but she fails to see any reasons as to why she should be on it. She disputes any reasons that have been given to her. She feels in no way can the teacher improvement plan continue under the observation of her principal, Ms Woods, and it appears the relationship has completely broken down and Ms Thompson is unfortunately stuck in a position where she cannot complete her teacher improvement plan so as to apply for work elsewhere as this needs to be completed before she goes but to complete it she would have to work again with Ms Woods.

I am of the opinion that she should not work with Ms Woods again. Their relationship has broken down entirely from Ms Thompson's perspective."

84. With regard to the applicant's capacity for work, Dr Allan stated,

"Overall, Ms Thompson remains vulnerable from a mental state perspective. Her adjustment disorder with depressed and anxious mood would likely worsen if she returned to the workplace without anything being different. I think it is sensible that the teacher improvement plan be completed as soon as possible and hopefully if her performance is adequate, she then can apply to work elsewhere and ultimately her working elsewhere would be the ultimate goal in this case. I feel she is capable of returning to work immediately but this cannot occur under the supervision of Ms Woods due to Ms Thompson's fixed attitude towards Ms Woods that has developed as a result of her perceived treatment since early 2017."

85. With regard to the predominant cause of the applicant's injury, Dr Allan said,

"It is clear overall that the teacher improvement plan has been the predominant cause of frustration, concern and stress for Ms Thompson.

There are issues outside of the teacher improvement plan in relation to her relationships with the executive and her supervisor, but overall it seems the teacher improvement plan and its implementation were the predominant cause of her psychological injury.

To confirm, the predominant cause of Ms Thompson's injury was therefore the actions taken or proposed by her employer with respect to the teacher improvement plan put in place in 2017."

Dr Peter Snowdon

86. Also, in evidence are Injury Management Consultation Reports prepared by Dr Peter Snowdon, dated 12 December 2018 and 21 January 2019.

87. Dr Snowdon noted that the applicant stopped work following an episode of self-harm, involving cutting her left arm, as a result of her emotional response to a second TIP meeting, on 7 August 2017. Dr Snowdon then took a history of events broadly consistent with the applicant's own evidence.

88. At the time of his 12 December 2018 report, Dr Snowdon took the view that the applicant could not,

"without the risk of exacerbation of psychological symptoms, return to the Leumeah Public School, however, she is fit to resume classroom teaching, full time, effective immediately, at another school..."

89. In his last report, Dr Snowdon responded to a complaint from the insurer that the Department had not been consulted prior to the dissemination of his previous report. Dr Snowdon noted that several attempts had been made to contact the employer without success.

90. Dr Snowdon commented,

“Finally, the Department may not be pleased with what have been the clinical and operational opinions expressed in Ms Thompson's case, however this is the opinion based appropriately, for an Injury Management Consultation, on what are felt to be the clinical and operational consensus from those involved in her care. Accordingly, I see no reason whatever for the report to be ‘revised’, as this frankly, to the best of my understanding, would seem to imply a change in the return to work recommendations for Ms Thompson which seems to imply another agenda than that decided upon by those involved in her clinical care.”

Ms Wood's evidence

91. The respondent's evidence includes a letter addressed to the applicant from Ms Wood dated 3 August 2017. The letter is headed “Teacher Improvement Program, Initial Letter to Teacher”.
92. The letter advised the applicant that a meeting had been organised to discuss the difficulty she was experiencing overall and to commence the implementation of a formal teacher improvement program. The meeting was to be held on 7 August 2017. The letter advised the applicant that confidential counselling services were provided by the Employee Assistance Program.
93. Ms Wood also provided a written statement dated 11 August 2017 which contains a timeline of events dating from 2016 onwards, set out in a series of dot points.
94. Ms Wood's statement indicates that on 18 March 2016, the applicant participated in a meeting with Ms Wood concerning her relationship with supervisor, Ms Linda Hambley. Ms Hambley challenged the volume of emails sent by the applicant to the team and said that other team members had heard the applicant complain about her supervisor. The applicant reported that she felt threatened, intimidated, intentionally isolated, worried and anxious. The applicant declined to attend a mediation with the supervisor.
95. Leave was taken on 16 and 23 to 24 March 2016. Sick leave was again taken on 9,16 and 24 June 2016. Stress-related sick leave was taken between 18 and 21 August and, on 21 August 2016, there was a conversation with the applicant about her well-being. The applicant reported feeling the effects of short lunch breaks, after-school meetings and having to catch up on schoolwork at home.
96. On 5 December 2016, Ms Wood noted that the applicant had changed grades to reports after a challenge to the high number of “highs” in her reports. The applicant had previously been questioned by her supervisor about this. The Deputy Principal, Ms Hill sat with the applicant to ensure she had evidence to support her grades.
97. Ms Wood noted that planning for maths was done at a Stage meeting held on 27 January 2017, during which the process and content to be used was explained. In week five, the applicant was asked by Ms Bull, her supervisor, to alter her programming in line with the content focus agreed upon at the meeting on 27 January. The applicant emailed Ms Bull and another stage member after the meeting to say she would not have time to alter the programming.
98. A formal meeting was held with Ms Bull about changing the mathematics planning and unnecessary emails and messages on 27 February 2017.
99. On 8 March 2017, the applicant sent an email expressing a wish to take leave without pay to do research, gather evidence and organise herself.

100. A meeting with Ms Bull and Ms Hill was held on 10 March 2017 to go through the mathematics planning process. The same day, Ms Wood held an informal meeting with Ms Hill to see how the applicant was going. Ms Wood stated,
- “Amanda states that she receives regular counselling. I provide her with strategies (EAP, Lifeline). Amanda is told to submit a sick leave form for 9/3 not LWOP. Her anxiety has been going on for some time. Issues with husband previously and that's why she's seeing a counsellor. Her anxiety could be worked based. Amanda's priorities are family, then work then health. She needs to get skills around organising her priorities so that they don't impact on her ability to work. I told her that we are not expecting her to demonstrate a L3 classroom after 5 weeks as a ES1 teacher. We are expecting Amanda to listen, take on feedback and then act appropriately.”
101. On 10, 13 and 17 March 2017, Ms Hill emailed the applicant with regard to counselling and leave.
102. On 19 March 2017, the applicant submitted her final mathematics planning to her supervisor. A meeting with the supervisor about the planning was held the next day.
103. On 28 March 2017, Ms Wood met with the applicant regarding her “well-being and professional growth”. The applicant complained of migraines and said there were no issues. Ms Wood expressed concern that the applicant was not focused. The applicant was given a support plan.
104. Supervisor observations were completed by Ms Bull and, on 31 March 2017, a meeting to discuss feedback was arranged. A number of emails were exchanged between the applicant and Ms Bull on 1 April about Term 2 programming and communications with parents.
105. On 5 April 2017, Ms Wood met with the applicant to talk about leave and her CV. The applicant indicated that her son had been sick. Ms Hill and Ms Bull also met with the applicant on 5 April 2017 to give feedback. A number of emails were sent from the applicant requesting feedback on 10, 11 and 12 April 2017.
106. A meeting was held on 26 April 2017 with Ms Bull and Ms Hill to discuss a formal support plan to be implemented in Term 2. On 27 April 2017, Ms Hill spoke with Ms Wood about the applicant's constant emails and how she seemed to want to fix issues herself.
107. On 3 May 2017, Ms Wood spoke to EPAC about the applicant failing to improve. An observation was completed by Ms Bull on 4 May 2017. On 7 May 2017, feedback was provided and a teaching plan adjusted. A further observation was completed on 10 May 2017. The applicant took sick leave on 11, 18 and 19 May 2017.
108. On 23 May 2017, Ms Bull met with the applicant to go over her reports with a focus on accurate reporting. On 25 May 2017, Ms Hill spent an hour with the applicant in regard to reports and language to be used.
109. On 26 May 2017, Ms Bull provided feedback about lesson observations. The applicant said she was not coping and there were too many demands on her. On 27 May 2017, the applicant sent an SMS requesting that further observations be delayed because she was feeling overwhelmed.
110. An observation was due on 31 May 2017 but did not take place as the applicant was on sick leave. An observation took place on 1 June 2017. Ms Wood indicated that the applicant was failing to demonstrate proficiency in all focus areas based on observations.

111. On 10 June 2017, Ms Hill performed an observation. Ms Bull performed an observation on 11 June. Feedback was given to the applicant by Ms Bull and Ms Hill on 12 June 2017.
112. In mid-to-late June 2017, Ms Hill corresponded with EPAC with regard to a TIP. An entry for 21 June 2017 indicated that Ms Wood had a discussion with EPAC as follows:

“1/6: Spoke with Elizabeth. She further clarified:

- No meeting week 10 as this would cause Amanda unnecessary anxiety over the holiday period
- Check other standards because there are not enough with the current attachment 6 to progress with a TIP
- Separate the standards on attachment 6
- We need to continue to provide support even though the plan has finished
- Potentially we need to gather evidence for standard 4
- The initial meeting will be unable to be held before week 2 of Term 3.
- Kerry will need to do observations
- Feedback and lesson observations will need to paint more of a picture of what is happening in the classroom with more detail.”

113. On 26 June 2017, it was noted that the applicant’s parent teacher interviews went over time by one hour and 10 minutes.
114. In July 2017, there were communications between Ms Hill and the applicant with regard to writing. Ms Bull provided feedback in Week 3 of Term 3 that she had to provide support to the applicant with regard to mathematics.
115. In an entry dated 7 August 2017, Ms Wood noted:

“7/8: Kerry puts a notification in that Amanda has reported self-harm to the NSWTF. Kerry has initial TIP meeting with Amanda, her support person and NSWTF rep. Amanda indicates that she is not well but does not want to go home. Amanda wants to continue with meeting. Amanda is strongly advised to go to the doctor. Kerry notifies director. Kerry rings H&S for advice to support Amanda.”

Respondent’s other evidence

116. There is attached to the Reply in excess of 400 pages of materials including emails, a Teacher Support Plan with notes added, written feedback on observations and an agenda and minutes of the meeting on 7 August 2017, not all of which were referred to in submissions. I have carefully read these materials although I have not referred to all of them in detail here.
117. Of particular note is a formal “dispute” dated 5 October 2017 prepared by the applicant with regard to the decision to implement a TIP. The applicant alleged that the decision to implement a TIP was flawed in several respects including:
- (a) It was based on observations during the period of the teacher support plan which focussed only on “word work” within guided reading groups and not other standards the applicant was identified as not meeting.
 - (b) The applicant had provided sufficient evidence of teaching relevant standards proficiently.
 - (c) The applicant had been teaching ES1 for a matter of weeks before observations commenced. The timing of the observations was unfair and possibly the result of bias due to personality differences.

- (d) Written feedback was not provided following the initial observation on 30 March 2017.
- (e) The applicant was supervised by a person with no more experience on ES1 than herself. The applicant queried her supervisor's qualifications to undertake formal observations and performance management resulting in the recommendation for a TIP.
- (f) The applicant was not given the opportunity to consistently respond to feedback, statements or decisions arising from observations.
- (g) The applicant was not consistently clearly advised of the standard or standards where performance difficulties existed and what level of performance was required.
- (h) The only observation completed by the Principal prior to implementation of the TIP was a writing lesson which was unrelated to "word work" in reading groups.
- (i) The applicant was given insufficient time to arrange a support person and not given an agenda for the initial meeting on 28 March 2017 when she was first advised that a TIP was being explored. Agendas were not provided for subsequent meetings. In email correspondence from the applicant to Ms Wood and Ms Bull on 29 March 2017 the applicant asked to be provided with a clear agenda for future meetings, and examples of work, with sufficient notice to prepare evidence that she was meeting the quality teaching framework.
- (j) The applicant was confused by the shift in focus to her literacy teaching in March 2017 when concerns had only been raised previously around the applicant's mathematics programming. In an email dated 1 April 2017, the applicant expressed confusion as to what specific aspects of her teaching were in question.
- (k) The applicant felt the process was delivered in a threatening rather than supportive way.
- (l) It was unclear to the applicant what would constitute "sufficient improvement".

118. Attached to the Reply is a written response from Ms Wood to the applicant's complaint of 5 October 2017, dated 3 November 2017. Addressing the concerns identified, Ms Wood:

- (a) Agreed that additional standard descriptors were included in the TIP that were not included in the support plan. Ms Wood offered to discuss the decision to include these standards and the evidence that supported the decision on the applicant's return to school.
- (b) Expressed the view that the school had managed the applicant's performance in accordance with the appropriate policy and procedures. Extensive and appropriate support was provided but the applicant was unable to demonstrate the necessary improvement.
- (c) Said that as a full-time teacher considered proficient against the *Australian Professional Standards for Teachers*, the applicant was expected to be able to teach across Early Stage 1 to 3.
- (d) Held no concerns with regard to Ms Bull's capacity as supervisor as an experienced educational leader. Ms Wood was confident that all the executive team were capable of exercising their professional judgement in supervising teachers.

- (e) Considered the lesson observation feedback from the applicant's supervisors during pre-program support was helpful, consistent, knowledgeable, supportive, timely, balanced and fair. Ms Wood considered the supervision and feedback provided to the applicant during the support plan was appropriate when she made the determination to move to a TIP.
- (f) Reminded the applicant of the EAP and advised her of her ability to request a review of how the complaint had been handled.

Respondent's submissions

- 119. Ms Goodman said that the respondent relied on the statement of Ms Wood referred to above. Ms Goodman took me through the events referred to in that statement and submitted that this demonstrated that quite a considerable period of time was spent discussing performance with the applicant, initially in an informal setting and later in formal meetings. Ms Goodman said this was consistent with the Department's Guidelines for the Management of Conduct and Performance, which were attached to the ARD.
- 120. Ms Goodman noted the letter dated 3 August 2017, in which the applicant was notified that a meeting had been organised to discuss implementation of a formal TIP. Prior to this point, everything was done to a great extent informally although notes were taken of observations, which appeared in the Reply and support provided to the applicant on an ongoing basis. The letter advised the applicant she was able to bring a support person. The applicant was also given a copy of the TIP procedures, which appeared in the Reply.
- 121. Ms Goodman submitted that the meeting of 7 August 2017 was what triggered the applicant's real difficulties. Although there was evidence of some difficulties prior to this date, overwhelmingly those difficulties were increased by the events of the meeting on 7 August 2017. Ms Goodman referred me to the applicant's own statement in this regard.
- 122. Ms Goodman submitted that the respondent's case was that the applicant's psychological condition was wholly or predominantly caused by actions that were reasonable. The respondent's actions with respect to discipline and/or performance appraisal were perfectly reasonable. The actions should be viewed objectively rather than from the applicant's perspective.
- 123. Ms Goodman said the respondent's view was that the applicable PIAWE figure was \$1,359.69. Ms Goodman said the applicant's figure was not supported by evidence relating to the 52 weeks prior to injury in accordance with the legislation. In particular, the PAYG summary for the period ending 30 June 2018 was not of assistance in determining the correct PIAWE, given the date of injury was in August 2017.

Applicant's submissions

- 124. Mr Stockley noted that the date of injury of 8 August 2017 was nominated by the respondent in its dispute notices but a date of injury in April 2017 had been used previously.
- 125. Mr Stockley submitted that the respondent was aware that the applicant had a psychological frailty that may or may not have been related to work. At a meeting on 10 March 2017, the applicant indicated to Ms Wood that she was receiving regular counselling. Mr Stockley submitted that the respondent's actions could not be seen as reasonable, in view of what was known about the applicant's psychological vulnerability.
- 126. Mr Stockley submitted that Dr Allan observed that the applicant had been prescribed sertraline from April 2017 onwards. Dr Allan referred to the TIP as something "hanging over" the applicant since early 2017.

127. Mr Stockley noted that the applicant gave evidence that she had been certified as a proficient teacher prior to 2016 and from an early stage expressed anxiety about her relationship with Ms Wood. The applicant said meetings with the executive were conducted in an impromptu and interrogating manner and caught her off guard. It was the applicant's perception, as early as March 2017, that she was being placed on a TIP. This appeared to have been a mistaken perception. At that stage, the applicant had already been in contact with the Teacher's Federation to seek advice. Mr Stockley said the genesis of the applicant's psychological distress, which ultimately led to her incapacity, was well and truly in place by March 2017.
128. Mr Stockley submitted that Ms Wood's response, that the applicant had not been placed on a TIP but this was a possibility, had the effect of increasing the level of anxiety and agitation experienced by a person already experiencing psychological distress.
129. In June 2017, the applicant was removed from the assembly in front of the whole of the school. Objectively, that conduct was humiliating and distressing. The applicant complained about this behaviour.
130. The applicant's formal TIP was overseen by Ms Wood. The medical evidence, including the report of Dr Allan, indicated that Ms Wood was the least appropriate person to perform that role.
131. Mr Stockley said it was clear that Dr Allan was of the opinion that the applicant's psychological injury was attributable to stress that she experienced in the workplace since early 2017 prior to the implementation of the TIP. Given the level of vulnerability that the applicant had and which was acknowledged by the respondent, the respondent's actions were inconsistent with reasonable action for the purposes of s 11A(1).
132. Mr Stockley took me to Dr Snowdon's first report. Mr Stockley noted that an earlier report dated 5 March 2018 had been prepared by Dr Snowdon for the respondent. Mr Stockley noted that the applicant was not in possession of the report and had requested a copy of it without response. Mr Stockley said it was known that the respondent was in possession of a psychiatric report from Dr Snowdon which they had chosen not to supply to the applicant or rely on in these proceedings. Mr Stockley said this was significant as the respondent bore the onus of proving that the particular injury was wholly or predominantly caused by particular events. The respondent had provided no medical evidence consistent with *Hamad v Q Catering Ltd*¹.
133. Mr Stockley submitted that the date of injury pleaded in the ARD was the date set out in the dispute notices but it was clear that the periods of incapacity in respect of which compensation was sought post-dated the date of injury. The failure of the respondent to implement a TIP at another school contributed to the incapacity. The attitude of the respondent toward the applicant was indicated by the communication from Mr Anderson with regard to disciplinary action. Mr Stockley submitted that the evidence post-dating the deemed date of injury was relevant to the incapacity resulting from the injury.
134. With regard to the applicable PIAWE figure, Mr Stockley noted that an amended wages schedule had been filed by the applicant and was unanswered. The Reply did not contain a wages schedule and one had not been filed pursuant to the Commission's direction. In the circumstances, the Commission was obliged to accept the applicant's wages schedule.

¹ [2017] NSWCCPD 6; BC201701872.

Respondent's submissions in reply

135. In submissions in reply, Ms Goodman took objection to Mr Stockley's submissions with regard to Mr Anderson's communications to the applicant on the basis that they were not relevant to the issues to be determined by the Commission. Ms Goodman noted that a deemed date of injury of 8 August 2017 was relied upon and said that what took place after this date could have no relevance to the s 11A(1) defence.
136. Ms Goodman referred to the email dated 31 March 2017 from Ms Wood to the applicant and noted that it clarified that the applicant had not been placed on a TIP. The respondent's aim was to provide support to the applicant to meet teaching standards. An important part of that support was classroom observation and feedback. Ms Wood indicated that the respondent genuinely wanted to ensure the applicant's success in the classroom. Although the applicant felt this was a threat, in fact the intent was something completely to the contrary. This was an example of the applicant misunderstanding what was being said to her.
137. Ms Goodman said the communications between the applicant and Ms Wood constituted actions with respect to performance appraisal and/or discipline and there was nothing unreasonable about the action taken. The fact that the applicant did not perceive the action in the same way was irrelevant. The Commission had to consider the actions objectively. Ms Goodman said it was clear from Dr Allan's second report that he considered the TIP and action with respect to that to be the dominant cause of the applicant psychological injury and this was sufficient for the purposes of *Hamad v Q Catering Ltd*.
138. With regard to the applicant's wages schedule, Ms Goodman stated that material in evidence clearly indicated the respondent's view with regard to the applicable PIAWE figure. A work capacity decision in this regard was made in November 2017. Although the date of injury used was 5 April 2017, this was closer to the date of injury relied on than the evidence relied on by the applicant. No steps were taken to ask the insurer to review its decision.
139. With regard to the claim for s 60 expenses, Ms Goodman said entitlement to the incurred expenses would depend on determination of the s 11A(1) dispute. Ms Goodman declined to make further submissions on the applicant's position that a general order for future medical expenses would be appropriate.

FINDINGS AND REASONS

Whether the applicant's 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 respect to performance appraisal and/or discipline

140. 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

- (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.”

141. “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.”

142. 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.”

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

144. In *Hamad v Q Catering Ltd*, Snell DP in 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.”

145. The test of reasonableness is an objective one³. In *Commissioner of Police v Minehan*⁴ 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*⁵:

“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

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

³ *Jeffery v Lintipal Pty Ltd* [2008] NSWCA 138.

⁴ [2003] NSWCA 239.

⁵ (unreported 18 June 1998)

employees against the objective of the employer. Whether an action is reasonable should be attended, in all the circumstances, by a question of fairness”.

146. In *Northern New South Wales Local Health Network v Heggie*⁶(*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.”

147. There is no dispute in this case that the applicant sustained a psychological injury for the purposes of s 4 of the 1987 Act. Although the applicant has pleaded a deemed date of injury of 8 August 2017, much of the evidence before me, including the dispute notice of 19 August 2018, deals with events occurring after that date. I have, therefore, confined my consideration for the purposes of s 11A(1) of the 1987 Act to the cause or causes of the injury as at the date of injury. I do, however, consider the evidence pertaining to events after 8 August 2017 to be relevant to consideration of the applicant’s incapacity and entitlement to compensation for medical expenses.

148. In submissions, Mr Stockley asserted that the respondent had not provided medical evidence as to the whole or predominant cause of the applicant’s psychological injury consistently with the observations of Snell DP in *Hamad v Q Catering Limited*. For this reason, it was said the respondent was unable to discharge the relevant onus.

⁶ (2013) 12 DDCR 95; [2013] NSWCA 255; BC201311746.

149. It is correct to say that the respondent has not qualified an independent medical expert to provide an opinion in relation to the claim. There are independent reports from Dr Snowdon in evidence but those reports are directed to the ongoing management of the applicant's injury and do not deal with question of causation. It is not correct to say, however, that there is no medical evidence as to the cause or causes of the applicant's injury. The applicant's own expert, Dr Allan, gives a medical opinion in this regard, as noted by Ms Goodman.
150. Dr Allan's reports indicate that the predominant cause of the applicant's injury were the actions taken or proposed to be taken by her employer with respect to the TIP in 2017. Reading Dr Allan's reports together, I do not take him to be expressing the view that it was only the actual implementation of the TIP (which in fact commenced only some 10 days prior to his first report) or the decision to impose a TIP, which caused the injury. It is clear that Dr Allan understood the TIP to be "hanging over" the applicant and causing her psychological symptoms since early 2017. The medical evidence also does not suggest that events at or preliminary to the meeting on 7 August 2017 at which the TIP was presented, were by themselves the whole or predominant cause of the applicant's injury.
151. I accept, having regard to the reports of Dr Allan and the evidence of the applicant's treating practitioners, that a series of events in the workplace from early in the 2017 academic year, which precipitated the determination by Ms Wood to place the applicant on a TIP, were the predominant cause of the applicant's psychological injury. I am further satisfied that these actions can broadly be described as actions with respect to performance appraisal although I am not satisfied that they necessarily involved "discipline".
152. The real question in this case is whether such actions were "reasonable". The respondent bears the burden of proving that the actions were objectively reasonable. It is not enough that the employer believes its actions were reasonable. The applicant's perception that the action was unreasonable is also not determinative.
153. The possibility of a TIP appears to have been first raised with the applicant on or around 28 March 2017. I accept that no decision to implement a TIP had been made at that stage notwithstanding an initial misapprehension by the applicant to the contrary. On 29 March 2017, the applicant sent an email to Ms Wood "appealing" the TIP. The reply from Ms Wood dated 31 March 2017 confirms that a TIP had been mentioned at a meeting on 28 March 2017 as a possibility if "sufficient improvement" was not made but had not yet been invoked. It was from that date onwards that formal observations of the applicant's teaching under a teacher support plan began.
154. Mr Stockley's submissions suggested that the respondent's implementation of this formal performance appraisal process was unreasonable in the context of the psychological vulnerability of the applicant, which was known to the respondent.
155. I accept on the evidence before me that Ms Wood and the school's executive were aware of psychological difficulties being experienced by the applicant from at least 2016 onwards. Ms Wood's statement suggests that the applicant had expressed feelings of being threatened, intimidated, intentionally isolated, worried and anxious as early as March 2016 in the context of a relationship with another supervisor. In August 2016, stress-related sick leave was taken by the applicant. On 21 August 2016, Ms Wood had a conversation with the applicant about her well-being. Most contemporaneously, on 10 March 2017, Ms Wood recorded that she had an informal meeting with the applicant to "see how she was going". During this meeting, the applicant advised Ms Wood that she was receiving regular counselling, had been experiencing anxiety for some time and that her anxiety could be work based. Both Ms Wood and Ms Hill gave advice to the applicant with regard to counselling and leave. It was in this context that the formal teacher support plan, which ultimately led to the decision to implement a TIP, was commenced on 28 March 2017.

156. The applicant's complaint with regard to the TIP, dated 5 October 2017, identifies a number of circumstances which in her view rendered the decision to implement a TIP in August 2017, unreasonable. These are set out above and include:
- (a) failure to inform the applicant of some of the standards she was identified as not meeting;
 - (b) failure to give proper consideration to the evidence presented by the applicant that she was meeting relevant teaching standards;
 - (c) the timing of the formal observations, being only a few weeks into the first term in which the applicant had taught the relevant stage;
 - (d) failure to provide timely written feedback;
 - (e) the applicant's performance being observed and assessed by a supervisor with no more experience than herself in teaching the relevant stage;
 - (f) failure to consistently give the applicant opportunities to respond to feedback or decisions arising from the formal observations;
 - (g) failure to consistently or clearly advise the applicant of her performance difficulties and the level of improvement expected of her;
 - (h) Ms Wood having completed only one observation herself, and
 - (i) failure to give the applicant sufficient notice of meeting agendas, examples of work and meaningful opportunities to respond to the performance difficulties identified.
157. In addition, the applicant's written evidence and contemporaneous communications with Ms Wood, indicate that she found the timing and frequency of the observations and informal feedback sessions challenging. Certain interactions were conducted in a manner which the applicant found intimidating and humiliating. The applicant's lay and medical evidence also suggests that the applicant considered that she was subjected to unduly close or unfair scrutiny, criticism or "nitpicking".
158. The material before me indicates that from the respondent's perspective, the manner in which the teacher support plan was implemented, and the decision to implement a TIP, were reasonable. I accept that the written correspondence from Ms Wood to the applicant in evidence, and the documentation prepared in connection with the teacher support plan in the Reply, appear on their face to be reasonable. These documents are expressed in appropriate language, make reference to relevant standards and guidelines, attempt to explain the performance appraisal process, suggest there is a degree of flexibility in the process and indicate an intention to support both the applicant's personal well-being and professional development. I have noted that in her response to the applicant's complaint made in October 2017, Ms Wood did not consider any of the applicant's allegations to be supported.
159. I am not satisfied, however, on the evidence before me that, objectively, the performance appraisal process leading to the determination to place the applicant on a TIP from March 2017 onwards was procedurally fair.

160. Ms Wood has conceded in her response to the applicant's complaint, dated 3 November 2017, that additional standard descriptors were included in the TIP that were not included in the support plan. The applicant has claimed, and there is contemporaneous correspondence from the applicant to Ms Wood indicating, that she was confused about the process, the expectations of her, the manner in which her performance was perceived to be deficient and the measure of improvement required of her. The written observation feedback documents attached to the Reply shed some light onto how or why the applicant may have been confused.
161. In an observation feedback dated 10 May 2017, for example, the following were identified as "things that worked well":
- You had prepared the lesson and made the necessary changes from the feedback and were sure to follow the plan when delivering the lesson.
 - Great how the students read the story and stopped at the word.
 - Wonderful to see them looking for the word in different contexts.
 - Taking the picture with their eyes. Making sure they were prepared to visually remember the word.
 - Lots of jumbling and building with the magnetic letters - very effective
 - Write and rub of the word worked well and was smooth."
162. Three areas were identified as requiring development: being sure not to point to the exact word in the text; too much prompting prior to building the word; and reinforcing to children that they are reading the word and remembering what the word says based on what it looks like.
163. The feedback for another observation, dated 1 June 2017, indicated that the applicant correctly followed steps when implementing word work and used correct language when delivering the lesson. The applicant was praised for giving students multiple opportunities at both building and writing words. The applicant was praised for giving students feedback on their performance in the word work. Two areas were identified as needing development: selection of words, sounds and letters at an appropriate level for each group and the applicant's timing and pace.
164. The feedback for an observation performed by Ms Wood on 26 August 2017 indicated that the applicant's lesson was "well prepared". The applicant was commended for connecting the lesson to the reading of the book previously. The applicant clearly stated or got students to state the goal of the lesson. The applicant was told that replaying parts of "Storyline Online" to assist student learning worked well. The applicant was said to be using the school student welfare system to positively reinforce contributions and behaviour. The areas for development suggested that, notwithstanding the comments above, the applicant should reconsider the use of "Storyline Online" because of the American accents and pace of the reader. Although this was said to fit with standard 3.4.2 and the use of technology to engage students, Ms Wood did not consider that it assisted with "lesson focus". The length of the lesson explanation should be shorter. The applicant was advised to keep cluster one students on the floor and send cluster two and threes off first. The applicant was said to have used a picture which was not in a lesson plan. Ms Wood thought the students would have benefited more from the plan to scribe and trace.

165. Whilst I accept that the written feedback attached to the Reply was not the only feedback given to the applicant, these particular documents do not clearly or objectively communicate that the applicant was performing at a level which was likely to result in her being placed on a TIP.
166. The evidence from both the applicant and Ms Wood confirms that observations were being performed on the applicant's teaching at frequent intervals from late March 2017. In addition, formal and informal meetings were being held at frequent intervals. There appears to have been a large amount of email correspondence between the parties as well.
167. By late May, the applicant had indicated to Ms Wood that she was not coping with the process and felt that too many demands were being made upon her. Leave was being taken. The applicant sent an SMS requesting that further observations be delayed because she was not feeling well. There is no evidence from the respondent as to what response or action taken to accommodate this request and the observations continued on 1 June 2017 when the applicant returned from leave.
168. It was clearly within the respondent's knowledge that the applicant had been experiencing psychological difficulties, for which she was seeking treatment, over an extended period and was feeling overwhelmed by the support plan process. The applicant communicated her difficulties with the process to the respondent. There is no evidence before me as to how or if the applicant's difficulties were accommodated in the implementation of the support plan.
169. I accept that Ms Wood and Ms Hill encouraged the applicant to seek external support. The language used in the written correspondence to the applicant is supportive and the applicant was repeatedly reminded of her ability to access external support from her doctor and through the EAP. I am not, however, satisfied that this was sufficient to render the process fair in the circumstances.
170. In view of what was being communicated by the applicant to the executive with regard to her psychological state and her difficulties with the performance appraisal process, it is apparent that greater care needed to be taken in communicating to the applicant the performance standards she was perceived as failing to meet and what was required of her to improve her performance. I am not satisfied that the applicant was placed in a position to meaningfully respond or take action to improve her performance in order to avoid the imposition of a TIP. There is no evidence, for example, that the timing and frequency of the informal and formal observations and meetings were in fact adjusted or deferred in a way which would accommodate the applicant's difficulties.
171. Perhaps the most serious example of the respondent's practical failure to ensure procedural fairness was that even after being informed that the applicant had self-harmed on Thursday, 3 August 2017, a meeting to implement the TIP proceeded on Monday 7 August 2017. Whilst the minutes of that meeting reveal that the applicant was encouraged to consult her doctor, had a support person and insisted she wished to proceed, it should have been clear to the employer that to proceed with the meeting in the circumstances would undoubtedly cause the applicant further harm and that she would not be in a position to respond meaningfully to the allegations put to her.
172. Whilst the defence in s 11A(1) will be established if the relevant actions are objectively reasonable, what is reasonable must be assessed having regard to the individual facts and circumstances of the case.
173. I am not satisfied that the performance appraisal process which resulted in the implementation of the TIP was in the applicant's case procedurally fair. I am not satisfied that the respondent's actions in this regard were objectively reasonable.

174. It follows that I am not satisfied that the applicant's psychological 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 performance appraisal and/or discipline pursuant to s 11A(1) of the 1987 Act.

175. The applicant's psychological injury is compensable under the Act.

Quantification of the entitlement to weekly benefits

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

177. The applicant seeks weekly benefits for the following periods:

- (a) 20 to 21 June 2018;
- (b) 14 to 31 August 2018;
- (c) 12 to 28 September 2018, and
- (d) 7 December 2018.

178. It is common ground between the parties that the applicant has received in excess of 13 weeks of weekly payments and so her claim falls within the second entitlement period pursuant to s 37 of the 1987 Act as it applies to this claim.

179. In order to determine the applicant's entitlement to weekly compensation in these periods, I must determine whether, the applicant had, at the relevant times, "no current work capacity" or "current work capacity" as defined in s 32A of the 1987 Act.

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

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

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

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

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

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

181. The WorkCover certificates and other medical evidence before me indicate that the applicant had no current work capacity from 14-31 August 2018 and on 7 December 2018.
182. The period in August followed the applicant's participation in professional development training on "the five dysfunctions of a team" and the final TIP observation and determination meeting. I decline, however, to make a determination as to incapacity during this period at the present time on the basis that the respondent indicated that it had not had an opportunity to fully consider and make submissions on these dates owing to their late inclusion in the claim. Consistently with the parties' agreement at conciliation, leave will be granted to the parties to either file consent orders or make submissions in respect of this period. If no submissions are made or agreement reached, a determination on the current evidence will be made at the conclusion of the timetable allowed.
183. The date on 7 December 2018 followed the applicant's receipt of correspondence from Mr Anderson informing her of disciplinary action proposed to be taken by the respondent following the completion of the TIP. I accept that the injury which was the subject of these proceedings remained causative of the applicant's incapacity on this date. This is consistent with the WorkCover certificate in evidence. I am satisfied that the applicant had no current work capacity as a result of the injury on this date.
184. The period 20-21 June 2018 occurred at a time when no suitable employment to accommodate her medical restrictions had been made available to the applicant. Similarly, in September 2018, the applicant was subject to restrictions that prevented her from working at Leumeah Public School. This restriction was not accommodated until October 2018 when the applicant was provided with suitable duties at the Glenwood Office. No submissions directed at the nature of any incapacity on these dates were made at hearing. I am satisfied that in both periods, the applicant was unable, as a result of the injury, to engage in her pre-injury employment or return to work in suitable employment. I am satisfied that in these periods also, the applicant had no current work capacity.
185. What remains is a determination of the PIAWE figure. There is in evidence a work capacity decision made by the respondent on 2 November 2017 that the applicant's PIAWE figure was \$1,359.69. This figure has been challenged by the applicant, in part because it was based on a deemed date of injury of 5 April 2017 rather than 8 August 2017, which was when the payments commenced. The applicant claims a PIAWE figure of \$1,491.32, based on her PAYG summary for the 2017/18 financial year, which showed total earnings of \$77,549. The applicant claims that owing to the respondent's failure to put into evidence a competing wages schedule, the applicant's schedule should be deemed to be admitted.
186. Rule 15.5 of the *Workers Compensation Commission Rules* provides:
- "15.5 Schedule of earnings**
In proceedings in which the quantum of weekly compensation is or may be an issue and there is or may be a dispute in respect of the actual or probable earnings of a worker during any relevant period, the following provisions have effect unless the Commission otherwise orders—
- (1) the applicant must include in the application to resolve the dispute a schedule containing full particulars of those earnings, including where applicable details of the current weekly wage rate as defined in section 42 of the 1987 Act, as in force before 1 October 2012,

- (2) in respect of 'pre-injury average weekly earnings', the particulars of such earnings should specify the relevant figures from time to time, having regard to the matters specified in sections 44C, 44D, 44E, 44F, 44G, 44H and 44I of the 1987 Act,
- (3) if a party wishes to dispute the accuracy of any matter in the schedule, the party must lodge and serve with the first document lodged and served by the party in the proceedings, in addition to any documents required under rule 10.3(1) to be lodged and served by the party, a schedule of the party's allegations of the earnings,
- (4) a matter not disputed by a party as provided in sub rule (3) is deemed to be admitted by the party."

187. Rule 15.5 applies unless the Commission orders otherwise. Ms Goodman submitted that the respondent should not be taken to have failed to dispute the PIAWE rate given that a work capacity decision inconsistent with the applicant's figure had been made.

188. Subsection 43(3) of the 1987 Act previously provided that the Commission did not have jurisdiction to determine any dispute about a work capacity decision of an insurer and was not to make a decision in respect of a dispute before the Commission that was inconsistent with a work capacity decision of an insurer. Subsection 3 has now been repealed⁷ and the Commission is no longer precluded from making a determination inconsistent with a work capacity decision. Nonetheless, I am not persuaded in this case that the insurer's work capacity decision was wrong.

189. The evidence relied on by the applicant post-dates the date of injury by almost a year. I am not persuaded that it constitutes evidence of the applicant's earnings in the relevant period⁸, being the period of 52 weeks immediately prior to the date of injury. Whilst the date of injury identified in the work capacity decision is some four months prior to the deemed date in these proceedings, payments only commenced from the date now relied on. I do not have before me any actual evidence of earnings in the relevant period. In all the circumstances I am satisfied that the PIAWE identified in the work capacity decision constitutes the best evidence of the correct figure before me. In the circumstances, I order that r 15.5 does not apply and find the applicable PIAWE figure to be \$1,359.69.

190. The figure of \$1,359.69 will be subject to periodic indexation pursuant to s 82A of the 1987 Act.

191. In view of the findings above, the applicant is entitled to payments of weekly benefits in accordance with s 37(1)(a) as it applies to this case in the following periods:

- (a) 20 to 21 June 2018;
- (b) 12 to 28 September 2018, and
- (c) 7 December 2018.

192. The respondent will have credit for any payments already made. To the extent that sick leave was paid on any of these dates, s 50 of the 1987 Act will apply.

⁷ Workers Compensation Legislation Amendment Act 2018 Sch 1.1 [1] [2].

⁸ Ss44C and 44D(1)(a) – 52 week

Entitlement to medical expenses

193. The applicant indicated at conciliation that in the event of a favourable determination on liability for injury, a “general order” for medical expenses pursuant to s 60 of the 1987 Act would suffice. Whilst the respondent did not “agree” to this approach, no submissions to the contrary were made.
194. The future medical expenses claimed by the applicant are for ongoing treatment with her psychologist and psychiatrist. I am not in a position to find that such treatment is reasonably necessary on an ongoing, indeterminate basis. Accordingly, I consider it appropriate to make a general order for s 60 expenses which will also cover the claim for incurred medical expenses.

SUMMARY

195. The applicant’s injury was not wholly or predominantly caused by reasonable action taken or proposed to be taken by or on behalf of the employer with respect to performance appraisal and/or discipline pursuant to s 11A(1) of the 1987 Act.
196. The applicant is entitled to payments of weekly benefits for the following periods pursuant to s 37(1)(a) of the 1987 Act, with credit for any payments already made and subject to s 50 of the 1987 Act:
- (a) 20 to 21 June 2018;
 - (b) 12 to 28 September 2018, and
 - (c) 7 December 2018.
197. The applicable PIAWE figure is \$1,359.69, as periodically indexed pursuant to s 82A of the 1987 Act.
198. In respect of the period 14 to 31 August 2018, the respondent has liberty to file consent orders agreed by the parties or alternatively make submissions as to the applicant’s incapacity and quantum of her entitlement to weekly benefits within seven days of being notified of this determination. The applicant has liberty to file any submissions in reply within a further seven days.
199. The respondent is to pay the applicant’s reasonably necessary medical expenses pursuant to s 60 of the 1987 Act, upon production of accounts, receipts and/or valid Medicare notice of charge.