WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number: **1921/20**
Applicant: **TYSON GEORGE HUDSON**
First Respondent: **WORKERS COMPENSATION NOMINAL INSURER**
Second Respondent: **MICHAEL WHITE**
Date of Determination: **8 JULY 2020**
Citation: **[2020] NSWWCC 227**

The Commission determines:

1. At all material times until 31 August 2019 the applicant was a direct employee of the second respondent pursuant to a contract of service and a worker within the meaning of section 4 of the *Workplace Injury Management and Workers Compensation Act NSW (1998)* (the 1998 Act).

2. The applicant's employment with the second respondent was terminated by the second respondent on 31 August 2019 (termination) through actions by the second respondent (actions).

3. The termination and actions caused and/or materially contributed to the applicant suffering psychological injury in the nature of major depressive disorder (psychological injury).

4. The applicant's psychological injury arose out of and in the course of his employment with the second respondent.

5. The actions were not reasonable action by the second respondent with respect to discipline of the applicant nor reasonable action with respect to the provision of employment benefits to the applicant nor otherwise within the exceptions provided by any criteria referred to in section 11A of the Workers Compensation Act (NSW) 1987, as amended (the 1987 Act).

6. The respondents have not satisfied the onus of proof under section 11A of the 1987 Act.

7. At all material times since 31 August 2019 the applicant has been totally incapacitated for work within the meaning of section 33 of the 1987 Act.

8. Since 31 August 2019 the applicant has had no capacity for work within the meaning of sections 36 and/ or 37 of the 1987 Act.

9. Psychological and associated treatment provided to the applicant to date is and has been reasonably necessary medical treatment which results from psychological injury suffered by the applicant within the meaning of sections 59 and 60 of the 1987 Act.

10. At all material times until 31 August 2019 the second respondent was uninsured for workers compensation (Employer's Liability Insurance) liability in the State of New South Wales for the purposes of section 140(1)(a) and section 140(2)(a) of the 1987 Act.

11. The first respondent was at all material times the nominal insurer of the second respondent for the purposes of section 142A(1) of the 1987 Act in the circumstances, having regard to the finding in 10. Above.

12. Award in favour of the applicant against the second respondent pursuant to section 36 and section 37 of the 1987 Act (limited by the maximum weekly payment prescribed by section 34 of the 1987 Act) as follows:

    (a) from 31 August 2019 to 30 September 2019 in the sum of $2,177.40 per week;
    (b) from 1 October 2019 to 31 March 2020 in the sum of $2,195.70 per week, and
    (c) from 1 April 2020 to date and continuing in the sum of $2,224 per week, as adjusted.

13. A general order is made in favour of the applicant in respect of section 60 (1987 Act) expenses relating to reasonable medical and associated treatment of the applicant concerning psychological injury determined herein.

14. Liberty is granted to the parties to approach the Registrar seeking restoration of these proceedings should there be any further dispute concerning quantum the subject of the determinations in paragraphs 12 and/or 13. above.

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

PHILIP YOUNG
Arbitrator

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

L Golic

Lucy Golic
Acting Senior Dispute Services Officer
As delegate of the Registrar

REASONS FOR DETERMINATION

BACKGROUND

1. Tyson George Hudson (the applicant) is a 49 year old man who has been a truck driver for the majority of his working life. In early 2018 he met another truck driver, Michael White (the second respondent). Mr White owned and drove his own prime mover, whereas the applicant was at that time employed by Light Pass Transport Pty Ltd (Light Pass) as an employed driver.

2. Mr White operated his truck driving business through his company, of which he was sole director, called Sand Road Enterprises Pty Limited (Sand Road). Both Light Pass and Sand Road held contracts to deliver alcoholic and other drinks for Hahn Corporation Pty Limited (Hahn).

3. In November 2018, both the applicant and Mr White were at Hunter Bottling Company at Pokolbin.[1] Mr White apparently became dizzy. The applicant left to get his partner, Kylie Rigby (Kylie) who is an ex nurse to look at Mr White. By the time the applicant returned, Mr White had been taken to hospital.

4. The applicant and Kylie went to see Mr White in hospital the following weekend. Mr White was worried about his truck. The applicant subsequently retrieved the truck on Mr White's behalf. Kylie arranged for Mr White, who by this time was receiving chemotherapy treatment, to obtain day release on the weekend. It would seem that by this time quite a friendship had developed because the applicant and Kylie would take Mr White back to their home at Bellbird on occasions for meals and the like.

5. The involvement of the first respondent, Workers Compensation Nominal Insurer in this matter is because it would appear that at no material time did Mr White hold a workers compensation policy of insurance in NSW. The applicant claims he was either a direct employee or a deemed worker of Mr White or Sand Road. Mr White claims that the applicant was neither. He says that the arrangement was a sub-contract arrangement where the applicant could, and in fact did at times, employ other workers to drive the truck. It follows, it was submitted, that the "deeming" provision in schedule 1 clause 2 of the *Workplace Injury Management and Workers Compensation Act 1998* (1998 Act) does not apply. The argument is that firstly the applicant was carrying on his own business and second does not fall within the definition because he sub-lets the contract or employs another worker.

PROCEDURE BEFORE THE COMMISSION

6. This matter came for conciliation and arbitration hearing by telephone conference on 29 May 2020. Mr S Hickey of Counsel appeared for the applicant instructed by Mr P Watson, Solicitor. The worker and his partner Ms Rigby were present. Mr F Doak of Counsel appeared for the first respondent. Mr N John, Solicitor, appeared for and with the second respondent present.

7. A preliminary issue concerned the admission into evidence of documents attached to the applicant's Application to Admit Late Documents dated 5 June 2020. Ultimately, the admissibility of those documents was not determined on the day. The admissibility of the documents as well as documents served by the second respondent upon the applicant on 27 May 2020 were at issue and are explained in the applicant's submissions.[2] It is sufficient to say that neither of the respondents in their submissions take issue with the proposal by the applicant that documents served by the second respondent on 27 May 2020 and documents

[1] Applicant's statement of 3 December 2019 at [29].
[2] Pages 1 – 2 applicant's submission dated 12 June 2020.

attached to the applicant's Application to Admit Late Documents dated 5 June 2020 should be admitted into evidence. The Commission determines that the documents are of relevance and are admitted into evidence.

8. In addition to those documents, the Commission has before it the following:

    (a) The applicant's Application to Resolve a Dispute dated 7 April 2020 and attachments (Application).

    (b) Reply by the first respondent dated 28 April 2020 and attachments (Reply 1).

    (c) Reply by the second respondent attached to the second respondent's Application to Admit Late Documents dated 5 June 2020 (Reply 2).

9. During conciliation on 29 May 2020 I used my best endeavours to bring the parties to a resolution of the dispute. I am satisfied that despite those endeavours the parties had been unable to resolve their differences. The matter accordingly proceeded to arbitration hearing.

Oral evidence

10. No oral evidence was given.

ISSUES FOR DETERMINATION

11. The issues in this matter are:

    (a) Was the applicant a worker of the second respondent within the meaning of the 1998 Act ?

    (b) If so, was the second respondent's termination of his engagement reasonable action and the applicant's injury wholly or predominately caused by that reasonable action with respect to a matter within section 11A of the 1987 Act?

    (c) If not, what is the extent of the applicant's capacity for work?

Submissions

12. The parties provided the following written submissions:

    (a) The applicant dated 12 June 2020.
    (b) The first respondent dated 19 June 2020.
    (c) The second respondent dated 26 June 2020.

    The above submissions have been carefully considered. As they are already in writing they will not be repeated except to the extent that direct reference is made to them in these Reasons.

The worker issue

13. Whilst Mr White was in hospital he had discussions with the applicant, including some discussions in the presence of Kylie Rigby.[3] Mr White's account is that those discussions included that the applicant would drive Mr White's truck (i.e. resign from Light Pass) and would be paid $2,000 per week directly in to his bank account. Mr White says that there was also discussion concerning the applicant's purchasing of Mr White's truck and taking over the Hahn contract as well as a possibility that Mr White could finance this arrangement.

[3] Statement Kylie Rigby of 9 February 2020 Application at page 212.

14. The applicant says that at the time of these discussions he had problems (presumably property settlement issues) with his ex-wife. The applicant says that Mr White asked him whether he was going to accept his offer of $2,000 "clear a week, full time and once I have sorted out the problems with my ex-wife" he would arrange to take the truck over[4]. Ms Rigby says that she was present and that the offer made was $2,000 "clear" and that she subsequently handed Mr White some payslips from the applicant's (at that time) present employment. The payslips demonstrated that the applicant was already receiving $1,800 per week clear (i.e. in addition to superannuation and taxation).

15. Ms Rigby also says[5] that not once during conversations did she hear any offer by Mr White to sell the truck nor any reference to the word "sub-contractor". Ms Rigby says that the first that she become aware of Mr White selling his truck was in an email Mr White sent to the applicant in April 2019.

16. Although Ms Rigby suggests that her first awareness of Mr White wanting to sell his truck was in April 2019, it appears that there was a general discussion about the applicant at some point in time concerning the applicant potentially taking the truck over.[6] Ms Rigby, however, offers some important information regarding the engagement.[7] Leaving out the hearsay aspects it would seem that about two weeks before the applicant commenced work driving Mr White's truck in December 2018, Ms Rigby handed to Mr White information regarding the applicant's bank account details "for pay, superannuation fund and member number, tax file number etc." Additionally, Ms Rigby says that Mr White "asked me if I was able to go to the post office and pick up a PAYG form for Tyson (the applicant) to fill and hand to him as this would be required by his accountant." Subsequently, the PAYG form was completed and handed to Mr White by the applicant in Ms Rigby's presence.

17. In evidence are several written communications between the applicant, Ms Rigby and Mr White. At page 106 of the Application Mr White explains that the applicant took over control of the truck on 14 December 2019. I treat this as a typographical error and it should refer to 14 December 2018 because all of the evidence indicates that the applicant did not perform any work beyond 31 August 2019. In any event, in around December 2018 the applicant was working the truck in Melbourne and somehow Mr White had an issue in his repossession of another truck which he had sold to another party. Mr White apparently blamed the applicant for those troubles and this resulted in Mr White requiring the applicant on 22 December 2018 to return the truck.

18. Sometime between 22 December 2018 and 4 January 2019 ,the applicant was in discussion with "Marty" from Hahn. Marty asked the applicant to do a job using Mr White's truck. The applicant was uncomfortable with that arrangement and so he emailed Mr White on 4 January 2019 to advise him what Hahn had requested.[8] Subsequently, Mr White contacted the applicant to ask whether he wanted his job back.

19. On 10 January 2019, Mr White sent the applicant a text message confirming that he had scheduled payment of the applicant's wage for $2,000 every Friday of each week, for the next three months.[9] On 9 January 2019 Mr White sent a text message to say that he would be putting a GPS tracker in the truck "at some stage, so I know where it is located at all times."

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[4] Applicant's statement of 3 December 2019 at [36].
[5] Application page 212.
[6] Applicant's statement of 3 December 2019 at [36].
[7] Statement Ms Rigby of 9 February 2020 at page 3 at Application page 213.
[8] Applicant's statement of 3 December 2019 at [47] at Application page 91.
[9] Application page 169.

20. The applicant drove the truck between 10 January 2019 and 31 August 2019, performing work for Hahn. Throughout this period the applicant would complete timesheets and supply these timesheets to both Hahn and Mr White/Sand Road. Hahn would create recipient created invoices reflecting the kilometre rate at the end of each month for the number of kilometres performed, a fuel levy and a load payment of about $88 per hour with an additional fuel levy and actual fuel costs. Hahn would pay Sand Road. Mr White would each Friday deposit $2,000 into the applicant's account.

21. A review of the timesheets indicates that the applicant regularly worked six days per week. As well as providing Hahn with timesheets the applicant had to provide confirmation that he was fit and well to drive and part of that involved showing that he had taken time off work of at least two days in the previous fortnight.

22. The applicant claims in his third statement[10] that on no occasion did he ever sub-contract the truck driving work. He goes on to add, however, that on two occasions "I had another driver drive for me, a Mr J Grabovic." The applicant adds that on these two occasions he had personal matters to attend to and that he spoke to Mr White on each occasion (Mr White was in hospital) and Mr White approved this occurring.

23. The reason for the relationship ultimately coming to an end is that on 13 August 2019 the applicant whilst driving the truck was stopped at Mount Victoria. Ms Rigby was with him. The RMS Officers put the truck over a pit and it was evident that the 100 KPH speed limiter had been adjusted. The applicant explains that because he was paid a weekly amount regardless of kilometres travelled, he not only did not make that adjustment, but had no motivation to do so. Nonetheless, the RMS Officers issued a defect notice against Mr White.

24. I have noted the various accounts concerning Mr White's taking possession of the truck on 31 August 2019. In summary, Mr White encouraged the applicant to put the truck into a depot for servicing and there are a number of friendly emails from Mr White to the applicant on 26 August 2019 and 27 August 2019 in that regard.

25. As events unfolded, the applicant put the truck in for service on or about 31 August 2019 and Mr White attended the service depot and retrieved the truck without first advising the applicant.

26. The relevant case law to consider is adverted to in submissions.[11] In summary, the matters that should be considered in deciding whether a contract of service existed include the following:

    (a) Who provided the tools and equipment?
    (b) What is the method of remuneration?
    (c) What are the arrangements about hours of work?
    (d) Were holidays provided for?
    (e) What was the extent of any obligation to work?
    (f) What arrangements were made for deduction of taxation?
    (g) What was the applicant's ability to delegate the work?
    (h) What right did Mr White have to require the applicant to perform the work personally?
    (i) What was the extent of the right to suspend or dismiss the applicant?
    (j) What was the extent of the right to exclusive services of the applicant?
    (k) What was the extent of the right to dictate the place of work, the hours of work

[10] 7 March 2020 at [15].
[11] *Stevens v Brodribb Sawmilling Co Pty Limited* (1986) 160 CLR 16*, Zuijs v Wirth Bros Pty Limited (1955)* 93 CLR 561*, Hollis v Vabu Pty Limited* (2001) ALR 263*.*

(l) and similar matters such as the right to control the matter in which the work is to be performed?
(m) Was a uniform prescribed?

27. The applicant at submissions page 16 [7] asserts that prior to 9 April 2019 the applicant was unaware of any intent that he might take over the truck and Mr White's contract with Hahn. This issue is, however, addressed in the applicant's first statement.[12] I accept that the applicant's account in this regard is correct. Mr White asked him whether he would accept the offer of $2,000 clear a week for full time work. I accept that Mr White told the applicant that once the applicant had sorted out the problems with his ex-wife he would arrange for the applicant to take the truck over. There is little doubt, in my view, first that the applicant was having problems with his ex-wife and this contributed to the parties gentle approach to the initial relationship and second, that Mr White possibly had an expectation of the applicant taking over the truck altogether at a time earlier than the applicant and Ms Rigby had in mind.

28. It is important to note in the latter regard that the commencement of the relationship occurred in circumstances where Mr White was quite ill and desperate to keep his truck earning income because of commitments both to Hahn in terms of the contract and presumably also to the company which had financed the vehicle.[13] But beyond the position where both the applicant and Mr White thought that some agreement might eventuate for takeover of the truck, I do not believe this aspect has much bearing on an analysis of the relationship. Everything concerning the truck takeover was still uncertain, undecided and inconclusive.

29. Addressing the indicia for a contract of service:

(a) Mr White supplied the tools and equipment, namely the truck, payment for repairs and use of the fuel card;

(b) The applicant received a regular weekly payment of $2,000 regardless of the amount of work he performed;

(c) The applicant did not work prescribed hours but the expectation was that he work as best as he could to fulfil Mr White's contract with Hahn. Mr White's unhappiness with what he regarded as the applicant taking too much time off work is not reflected by the timesheets. It also points to Mr White holding a reservation of the right to control the applicant's performance of work;

(d) There is no evidence of specific provisions for holidays, but the parties contemplated that the applicant might take over the truck in the future and it was therefore in the applicant's interests to work as hard as he could, which he did up to six days per week. Additionally, the applicant had not yet worked for Mr White for 12 months at the time of termination of his employment on 31 August 2019. The time for taking holidays had not arisen;

(e) The applicant was obligated to work for Mr White to satisfy Mr White's contractual obligations with Hahn. I accept the applicant's submissions that he had to work as much as possible. It is clear to my mind that in these types of commercial settings it was very important for Mr White to keep Hahn happy. I would add that this, no doubt, was an added reason that Mr White was happy engaging the applicant in the first place. The applicant in his previous employment already had a working relationship with Hahn;

[12] Statement 3 December 2019 at [34 -37].
[13] The vehicle was financed because the evidence is clear that at one point Mr White enquired whether the applicant could take over his repayments. See also paragraph 97 of Mr White's statement at Application p 115.

(f) I accept Ms Rigby's statement concerning her handing over account, taxation and superannuation information to Mr White. It follows that to the extent that intention may be tangentially relevant, Mr White was expected to take out taxation and pay superannuation. It is evident that the applicant was earning $1,800 clear with his existing employer. There would be no reason, in my view, for him to switch employment unless he received more income, namely a figure greater than what was agreed.

(g) I accept the applicant's evidence that on two occasions he arranged for another driver to drive Mr White's truck. The nature and extent of payment to this driver is not the subject of any evidence. As the applicant was not using his ABN number, I infer that the applicant paid the driver cash from his own wages. I do also accept that Mr White was aware of the request and approved the involvement of the other driver. Because of the fact that Mr White retained open lines of communication with Marty from Hahn, it makes common sense that were the applicant not to clear the way with Mr White, Marty might ask Mr White about the new driver. There was, therefore, clear incentive for the applicant to obtain Mr White's approval.

(h) During the arrangement Mr White had rights to require the applicant to exclusively drive the truck and retained to himself a right to dismiss the applicant's employment which he exercised on two separate occasions.

(i) Mr White retained rights to control where the applicant took the truck, for how long, and how he might go about it. Because of Mr White's illness it was understandable that the applicant was not constantly troubling him with day-to-day operation of the truck, but there is sufficient email and text message evidence to the effect that the applicant was seeking Mr White's approval and accepting his instructions in matters concerning which jobs might be performed and when the truck should be placed in for service.

30. I accept the first respondent's submissions that it is necessary to examine the whole of the relationship and that labels applied by the parties themselves are not necessarily determinative.[14] However, the fact that in the statement given by the applicant to the investigator the applicant did not make reference to being an employee does not, in my view, necessary conclude the matter.

31. In terms of the absence of evidence concerning taxation and superannuation payments, the applicant was not to know that these deductions had not been made before his weekly payment of $2,000 had been arrived at. There was no occasion to have received from Mr White a Group Certificate until the applicant's request on 29 June 2019. There was no annual payment summary due from any superannuation company. The applicant says that[15] 29 June 2019 was the first time he was ever told that "he was a contractor." The applicant sent an email to Mr White about the PAYG form he had filled out and given to him and Mr White denied having ever received it.[16] That evidence of the applicant is not dealt with by Mr White in his answers to questions with BH Investigations Pty Limited dated 21 January 2020 at all. But the handover of the PAYG form is corroborated by Ms Rigby and I accept her evidence in that regard.

32. Unfortunately, it is not clear from Mr White's answers of 21 January 2020 whether or not Mr White had been provided with the applicant's first statement of 3 December 2019 at all. It is therefore difficult to be critical about the fact that Mr White's answers do not specifically address the applicant's detailed statements.

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[14] *Hollis v Vabu* op cit.
[15] Statement of 3 December 2019 at [61].
[16] Ibid at [62].

33. However, at page 104 of the Application Mr White's answers address a number of issues and these are relevant to the nature of the arrangement. These answers are in response to a list of questions forwarded to Mr White's lawyer, Mr Neville John at KJK Legal in Adelaide by email of 18 December 2019 with the response being dated 21 January 2020.

34. Question 21 to Mr White and his answer given was as follows:

> "21. What were the normal hours per week that Mr Hudson was expected or engaged to work?
>
> A: Varied – average of about 40."

Mr White therefore contemplated that the applicant would be expected to work for him and his company for about 40 hours of each week. This weighs in favour of the exclusivity of the engagement, in my view.

35. Mr White confirms[17] that the $2,000 payment was to be made each week, regardless of hours worked.

36. The applicant did not invoice Mr White.[18] No payslips were issued by Mr White.[19] Mr White asked the applicant to provide an ABN number.[20] When asked why the applicant was required to have an ABN, Mr White replied "because he was to run the truck as his own business." Mr White was not asked, nor did he volunteer, why he needed to be given the applicant's ABN number. He was not asked, nor did he volunteer, whether he actually received an ABN number from the applicant. But what can be said is that had Mr White received an ABN number, one would expect him to point to his use of that number, for example in remitting the applicable goods and services tax to the Australian Taxation Office, because such a remittance would assist his case that the applicant was a contractor. That leads me to infer (in the absence of evidence to the contrary) that no goods and services tax was charged by the applicant nor paid by Mr White. The absence of goods and services tax must also in my view weigh against there having been a purely contractual business relationship.

37. In the circumstances, for the reasons mentioned above I prefer the evidence of the applicant and Ms Rigby in all contentious matters over the evidence of Mr White. In my view, at all material times the applicant was engaged to perform work for Mr White under a contract of service and accordingly I find that he was a worker for the purposes of that definition in section 4 of the 1998 Act.

Medical opinion and section 11A

38. Neither of the respondent's submissions seek to dissect nor cavil with the medical evidence advanced by the applicant. The applicant's medical evidence consists of several SIRA certificates of capacity of his general practitioner (Dr Samarasinghe) and medical reports of Dr Vickery dated 23 December 2019 and 19 February 2020.

39. In Dr Vickery's first report after taking a history from and examining the applicant, Dr Vickery diagnosed major depressive disorder resulting from injury, namely work-related incidents with Mr White involving the termination of the applicant's employment in circumstances where Mr White also failed to finance the lease of a truck for him. Dr Vickery regarded the applicant as having been totally incapacitated for work since he ceased working on 31 August 2019. The applicant's employment was the main contributing factor to his injury.

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[17] Mr White's answers from Application page104 at [24]-[25].
[18] Ibid at [26].
[19] Ibid at [27].
[20] Ibid at [28].

40. Subsequently, Dr Vickery was asked by iCare Solicitors (first respondent) whether Mr White's actions concerned discipline or employment benefits. Dr Vickery's conclusion was that Mr White's actions regarding the provision of employment benefits to the applicant was the whole or predominate cause of the applicant's injury. There is no medical dispute from any party about that proposition. This conclusion does not take the matter any further unless the respondent(s) can prove that this action was reasonable action.

Section 11A

41. The second respondent accepts (and the first respondent does not dispute) that Dr Vickery's evidence supports a finding that Mr White's actions in repossessing the truck caused the applicant's psychological injury. The second respondent also claims that Mr White's actions were with respect to discipline and were reasonable*.* The second respondent submits that the applicant should have been (and was quite reasonably, it follows) so disciplined for these reasons[21]:

    (a) the applicant failed to inform Mr White that the truck had received a defect notice for an altered speed limiting device;

    (b) the applicant had sub-let or used another driver to perform the work without obtaining Mr White's consent, and

    (c) the applicant failed to meet Mr White's contractual obligations with Hahn without telling him of deficiencies in service delivery.

42. As to (a) above, Mr White's evidence is not that the applicant failed to tell him anything because Mr White acknowledges that he (Mr White) himself received the breach report. Mr White's allegation is that the applicant tampered with the speed limiter, however, the applicant denies that, he had no motivation to do it and there is no evidence that he did it.

43. As to (b), it is the applicant's evidence that he obtained Mr White's consent to use another driver and I have accepted this evidence above. As to (c), namely inability to meet obligations under the Hahn contract, this is not mentioned by Mr White in his answers.[22] It is, in my view, satisfactorily explained by an email from Mr White to the applicant and Kylie Rigby of 27 August 2019 at 6:31PM [23]. In that email Mr White said: -

    "…Hahn have told me that there won't be any work till next Monday…"[24]

    It is clear in my view that at this time Mr White exercised authoritative and controlling communications with Hahn and the applicant concerning the prospective use of his truck. Mr White in my view, it follows, "called the shots" concerning what the applicant could or could not do with the truck. Mr White was in control.

44. Reasons advanced by Mr White concerning why there was no contract of employment include: -

    (a) communication with the applicant was virtually impossible and he had no idea where the applicant was living;

[21] These are the main reasons advanced by Mr White for his decision to terminate the applicant's employment at that time. Application page 114, Mr White's explanation in answer at paragraph 95. See also second respondent's submissions page 6.

[22] Application page 114 question 95.

[24] Application page 8.

(b) the applicant adorned the truck with his own personal additions, and

(c) Mr White decided that the applicant was not going to be able to purchase the truck from him.

45. It is clear from the several emails and text messages that communication between Mr White and the applicant was occurring. There is no evidence that the applicant's adornments damaged the truck in any way. Mr White subsequently sold the truck and I infer that this was the major reason why he retrieved the truck from the applicant on 31 August 2019.

Reasonable action

46. The question of reasonableness of disciplinary action should be approached by considering what the respondent knew and what it should have known at the time action was taken[25]. In the words of Sackville AJA[26]: -

> "…Ordinarily, the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time, taking into account relevant information that the person could have obtained had he or she made reasonable inquiries or exercised reasonable care…"

An important question becomes what the person (Mr White) could have done to establish basic background information before formulating allegations of serious misconduct in the context of a very serious matter, namely in this matter the termination of the applicant's employment because of the reasons identified by Mr White and discussed above.

47. The initial issue for Mr White is whether his decision to terminate the applicant's employment (evidenced by repossession of the truck and Mr White's own evidence) amounted to "reasonable action". What information did Mr White have concerning the applicant's failure to perform his employment duties?

48. The respondent(s) of course bear the onus in this matter. One would expect to have received some evidence from the respondent(s) dealing with why it could not reasonably have determined, before making serious allegations, whether or not the applicant had tampered with the 100 km speed limiter on the truck so that summary dismissal of the applicant's engagement should occur. Or there might have been evidence supporting the matters referred to in paragraphs 42-45 above. On either view, a main reason for the termination of the applicant's employment was the speed limiter issue, in respect of which there is no evidence.

49. The Commission makes the following determinations:

(a) At all material times until 31 August 2019 the applicant was a direct employee of the second respondent pursuant to a contract of service and a worker within the meaning of section 4 of the 1998 Act.

(b) The applicant's employment with the second respondent was terminated by the second respondent on 31 August 2019.

(c) Termination of the applicant's employment together with matters concerning failure of the second respondent to assist the applicant with financing (the actions) caused the applicant psychological injury in the nature of major depressive disorder (psychological injury).

[25] *Heggie v Northern NSW Local Health Network* [2012] NSWWCCPD 9, per Sackville AJA.
[26] *Ibid* at [61].

(d) The applicant's psychological injury arose out of and in the course of his employment with the second respondent.

(e) The actions were not reasonable action by the second respondent with respect to discipline of the applicant nor reasonable action with respect to the provision of employment benefits to the applicant nor otherwise within the exceptions provided by any criteria referred to in section 11A of the 1987 Act.

(f) The respondents have not satisfied the onus of proof under section 11A of the 1987 Act.

(g) At all material times since 31 August 2019 the applicant has been totally incapacitated for work within the meaning of section 33 of the 1987 Act.

(h) Since 31 August 2019, the applicant has had no capacity for work within the meaning of sections 36 and/ or 37 of the 1987 Act.

(i) Psychological and associated treatment provided to the applicant to date is and has been reasonably necessary medical treatment which results from psychological injury suffered by the applicant within the meaning of sections 59 and 60 of the 1987 Act.

(j) At all material times until 31 August 2019 the second respondent was uninsured for workers compensation (Employers' Liability Insurance) liability in the State of New South Wales for the purposes of section 140(1)(a) and section 140(2)(a) of the 1987 Act.

(k) The first respondent was at all material times the nominal insurer of the second respondent for the purposes of section 142A(1) of the 1987 Act in the circumstances, having regard to the finding in (j) above.

(l) Award in favour of the applicant against the second respondent pursuant to section 36 and section 37 of the 1987 Act (limited by the maximum weekly payment prescribed by section 34 of the 1987 Act) as follows:

    (i) From 31 August 2019 to 30 September 2019 in the sum of $2,177.40 per week;

    (ii) From 1 October 2019 to 31 March 2020 in the sum of $2,195.70 per week, and

    (iii) From 1 April 2020 to date and continuing in the sum of $2,224.00 per week, as adjusted.

(m) A general order is made in favour of the applicant in respect of section 60 (1987 Act) expenses relating to reasonable medical and associated treatment of the applicant concerning psychological injury determined herein.

(n) Liberty is granted to the parties to approach the Registrar seeking restoration of these proceedings to the List should there be any further dispute concerning quantum the subject of the determinations in (l) and/or (m) above.