WORKERS COMPENSATION COMMISSION

CERTIFICATE OF DETERMINATION

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

Matter Number:	**2195/19**
Applicant:	**Wayne John Jarvis**
Respondent:	**Toyota Material Handling Australia Pty Limited**
Date of Determination:	**15 August 2019**
Citation:	**[2019] NSWWCC 276**

The Commission determines:

1. The applicant suffered an injury as a result of the nature and conditions of his employment with the respondent with a deemed date of injury of 15 June 2018.

2. The injury referred to in (1) above was wholly caused by the actions of the respondent with regards to discipline;

3. The actions of the respondent referred to in (2) above were not reasonable;

4. The applicant's Preinjury Average Weekly Earnings were $2,128.50 per week;

5. The applicant suffered total incapacity for employment between 15 June 2018 and 14 June 2019 as a result of the injury referred to in (1) above;

6. The applicant was paid weekly compensation between 15 June 2018 and 27 September 2018;

7. The respondent is to pay the applicant weekly compensation for the period 28 September 2018 to 14 June 2019 at the rate of $1,702.80 per week (being 80% of the applicant's Preinjury Average Weekly Earnings), and

8. The respondent is to pay the applicant's reasonably necessary medical and treatment expenses upon production of accounts, receipts and/ or Medicare Australia Notice of Charge.

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

Cameron Burge
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 CAMERON BURGE, ARBITRATOR, WORKERS COMPENSATION COMMISSION.

A Sufian

Abu Sufian
Senior Dispute Services Officer
As delegate of the Registrar

STATEMENT OF REASONS

BACKGROUND

1. Wayne Jarvis (the applicant) brings these proceedings against Toyota Material Handling Australia Pty Limited (the respondent) seeking payment of weekly benefits and medical expenses arising from a psychological injury suffered in the course of his employment. The fact of the injury was formally conceded at the hearing of the claim, and the deemed date of injury is 15 June 2018.

2. The applicant is currently 66 years of age. He was employed as a Field Service Technician by Mander Toyota in 1981. In or about 2008, Mander Toyota changed its name to that of the respondent. The applicant maintained his position with the respondent until his employment was terminated on 11 September 2018.

3. The applicant was based at Flemington Markets. He was responsible for the maintenance and servicing of a large number of forklifts at that site. Those forklifts were owned by various customers who would arrange for the maintenance of their forklifts with the respondent. The applicant's role was to examine the schedule of services/repairs then attend to servicing and/or repairing the forklifts on site at the markets.

4. The applicant states that prior to the events giving rise to this dispute, he had only had one disciplinary issue during his time working with the respondent (referred to hereafter as "the 2015 issue"). In 2015, at the request of a customer the applicant placed stickers on certain forklifts indicating they had been serviced, when they had not. He acceded to the request because the customer was facing an occupational health and safety (OH&S) audit. The respondent found out about the applicant's actions and he faced disciplinary action in relation to them.

5. The circumstances leading up to the applicant's injury are largely uncontested, and will be dealt with in further detail later in these reasons. By way of summary, in April 2018, the applicant attended a "tool box meeting" at the respondent's yard, along with a group of his colleagues. At that meeting, Stephen Anderson who is the Branch Services Manager for the respondent, had displayed two job services cards to the meeting which related to work carried out by the applicant in March 2018. The applicant states Mr Anderson pointed out everything wrong with the work cards but did not name the worker involved, and told the meeting "The person involved in these repairs would be spoken to."

6. The applicant states he heard nothing further about the matters raised in that meeting until 24 May 2018, when he was at the markets and received a call requesting he return to the respondent's Moorebank premises immediately. He asked the caller, George, why he had to attend, and was told the caller wasn't sure, but suspected the respondent was going to issue the applicant with his new uniform, which he had been waiting on for several weeks.

7. The applicant says he duly attended the respondent's premises, where Mr Anderson presented him with his uniform, then also gave him a sealed envelope. The letter related to the matters discussed at the meeting in March 2018, and required a response from the applicant to the allegations raised by no later than 9.00 am on 29 May 2018. The applicant engaged the assistance of his union, the AMWU to complete his initial response, and after it was submitted was told the matter was still being investigated and further information was requested of him. Details of the correspondence between the applicant's union, the AMWU and the respondent are set out later in these reasons.

8. On 24 May 2018, the applicant had his mobile phone and work tablet removed and was allocated to remain at the Moorebank premises, despite the letter to him stating he would perform his normal duties while the matter was investigated.

9. According to the applicant, further allegations were raised against him throughout June 2018 concerning work relating to seven other forklifts. He responded via his union. On 15 June 2018, the applicant states he stayed at home from work as a result of his injury, which he said had been building over time since the toolbox meeting and subsequent raising of allegations against him. On that day, the applicant consulted Dr Eric Lim, his general practitioner, who issued him with a certificate of incapacity.

10. On 18 June 2018, the applicant completed a Claim Form in respect of his injury. He alleged a date of injury of 24 May 2018.

11. On 24 August 2018, the respondent wrote to the applicant setting out the findings of its investigation. It found the allegations against him substantiated, and considered them sufficiently serious to justify terminating the applicant's employment. The applicant was provided with the opportunity to show cause in writing by 31 August 2018 as to why his employment should not be terminated. The applicant's union responded on his behalf on 31 August 2018.

12. On 10 September 2018, the respondent's insurer issued a section 74 notice which placed in issue whether the applicant had suffered injury, and also raised a defence under section 11A of the *Workers Compensation Act 1987* (the 1987 Act), on the basis that if the applicant had suffered an injury, it was caused by the reasonable actions of his employer with regards to discipline. As has been noted in paragraph (1) above, injury is now conceded.

13. On 11 September 2018, the applicant's employment was terminated in writing.

14. On 21 February 2019, the applicant's solicitors requested a review under section 287A of the 1987 Act. On 7 March 2019, the respondent's insurer wrote to the applicant's solicitors and maintained the denial of liability. Relevantly, the respondent stated its defence under section 11A related to its actions taken in respect of discipline, performance appraisal or dismissal.

15. On 9 May 2019, the applicant commenced these proceedings.

ISSUES FOR DETERMINATION

16. The parties agree that the following issues remain in dispute:

    (a) Whether the applicant's injury was caused by the reasonable actions of the respondent with respect to discipline, performance appraisal or dismissal, and

    (b) Whether the applicant had suffered incapacity for work as a result of his injury, and if so to what extent.

PROCEDURE BEFORE THE COMMISSION

17. The parties attended a hearing on 3 July 2019. 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.

18. At the hearing of the matter, Mr L Morgan of counsel appeared for the applicant, and Mr P Barnes of counsel for the respondent.

19. At the outset of the hearing, Mr Morgan amended the Application to Resolve a Dispute (the Application) to claim a general order for medical expenses under section 60. He also noted the period of any claim for weekly benefits is from 28 September 2018 to 14 June 2019, as the applicant had reached retirement age at the deemed date of injury (see section 52(2)(b) of the 1987 Act).

EVIDENCE

Documentary evidence

20. The following documents were in evidence before the Commission and taken into account in making this determination:

    (a) Application and attached documents;

    (b) Reply and attached documents;

    (c) Applicant's Application to Admit Late Documents (AALD) dated 4 June 2019 and attached Wages Schedule, and

    (d) Respondent's AALD dated 26 June 2019 and attached documents.

Oral evidence

21. There was no oral evidence called at the hearing.

The lay and documentary evidence

22. The applicant provided two statements, the first dated 11 July 2018 and the second 10 April 2019. In addition to the matters set out in the background to these reasons, the applicant's statements provided further detail as to the circumstances leading to his injury.

23. The applicant stated that although his supervisor was Mr George Daglis, they would rarely interact, as the applicant generally went from home direct to job sites, rather than attend the respondent's Moorebank premises. He stated he would only attend the Moorebank premises to collect parts and to participate in scheduled toolbox meetings. He described his duties as follows:

    "15. In summary, my role has remained the same throughout the course of my employment. My primary duties relate to travelling from various Toyota material handling products, which is predominately forklifts and bobcats.

    16. The customers are based throughout all of NSW. I have a schedule of the work for the day and would continually review this schedule for new urgent repairs and or assessments, along with the pre-booked appointments.

    17. Generally, I would receive telephone calls from the customers and discuss with them the issues and then schedule appointment. I was predominately the person arranging my own workload.

    18. The company provides me with a work vehicle. I also have own my tools, but I also have further tools and equipment provided by my employer. Between myself and my employer, I would have all required material and tools to complete my job.

19. Further parts may be required to complete the job, however, I would need to arrange these parts whilst I am onsite and have identified the issues. Depending on the urgency of the job along with the availability of the parts, I may or may not be able to finalise all repairs."

24. Recalling the 2015 incident, the applicant said in his first statement:

> "25. The only known complaint I am able to recall related to an incident about three years ago. I had been appointed by my employer to remain onslte [sic] for a particular customer for an extended period.
>
> 26. This particular customer had about 30 forklifts that required daily maintenance. I would remain onsite and complete any work required when instructed by the customer management.
>
> 27. On one particular day, I was contacted by the Manager from the customer and asked to place stickers on a couple of forklifts confirming that they had been serviced. I knew the work was not completed and so did the customer and I was initially reluctant, but the customer continued to persuade before I agreed.
>
> 28. The reason the customer wanted this work completed related to a OH&S audit that was being conducted.
>
> 29. Shortly thereafter, I do not know how or why, but my employer was notified that I had placed service stickers on forklifts, despite not completing the work. As a result, I had to sign documentation with my employer confirming that I would not do anything of this nature again. Furthermore, I was removed from the customer site."

25. Explaining his role at the Sydney Markets, the applicant said:

> "35. I would attend the Sydney Markets on a regular basis and if there were issues, I would speak to the relevant manager. Generally, it would be rare for me to contact any of the managers, as they would contact me if they had questions about completing certain tasks for their own teams. I would be used in this way as a form of experience and my input valued for their duties."

26. The applicant confirms in his statement that he was the employee referred to by Mr Anderson as having carried out the problematic work which was discussed at the toolbox meeting in March 2018. He discussed that meeting in the context of receiving the letter regarding the complaints against him on 24 May 2018, and described the March 2018 meeting in the following terms:

> "46. I had a suspicion that this letter related to two jobs I completed in March 2018. The reason I had this suspicion related to a toolbox meeting held by Steve Anderson in March 2018 and in front of my colleagues he referenced and displayed the job numbers for two matters that I had attended and completed.
>
> 47. Steve was discussing with the group everything that they found wrong with the work on these two forklifts for one customer. Keeping in mind, that the customer never raised these issues, as these machines had recently been returned to my employer to be sold.

48. These forklifts had been leased for two complete terms, which is about 8-10 years and were older forklifts. The customer had upgraded and returned the older models, which are then sold by Toyota Material Handling Australia.

49. Steve discussed the issue that if we attend a site, we need to ensure that all repair components are completed and or at least organized.

50. I was not approached by Steve in regards to their findings, but he only said during this toolbox meeting in front of my 60 colleagues, 'The person involved in these repairs would be spoken to."

51. Steve would list all the issues they discovered within their review of the forklifts which had since been returned. I was frustrated, as the way it was discussed by Steve almost appeared as though they were ignoring the reason for the outstanding repairs and never made any attempts to discuss it with me. In the past, I have seen them discuss the issues with my colleagues when they have made errors, but with me it appears they quickly used my work as an example to scare my colleagues and myself."

27. The applicant states that when he attended the Moorebank premises on 24 May 2018, he was directed to see Mr Anderson. He said:

"43. I approached Steve and spoke to him in his office. He said, 'Here go mate. There is your uniform' and handed me a sealed uniform box and then said, 'Oh, there is also this envelope'.

44. I did not know what was within the envelope and I said, 'Do I need a Union Representative present?' and he said, 'No. Not at this stage'.

45. Based on my experience, the envelope is a sign of a complaint or something important in relation to employment."

28. As expected, the letter provided to the applicant concerned the forklifts the subject of the March 2018 toolbox meeting. The applicant then set out the alleged circumstances surrounding the servicing of those. He said he had arrived to complete a service on the forklifts, which are serviced every three months or 300 driving hours.

29. The applicant said he could tell the forklifts were quite old (between 8 and 10 years) and likely nearing the end of their service life. He therefore contacted Michael Tsougranis, the sales manager. They had a conversation in which Mr Tsougranis is alleged to have told the applicant the forklifts were very soon to be replaced, and said "Don't worry, don't do too much. Just get it running, the lease has expired and they will be sold for parts within the coming weeks." The applicant says he then "simply worked on the forklifts to get them up and running for the customer to use until the new forklifts were delivered to them." According to the applicant:

"57. I was aware that these forklifts were returned to my employer and therefore sold for parts. In hindsight, I believe when they received the forklifts, they conducted an inspection and only looked at the current condition, without ever knowing what had happened between myself, Mick and the customer.

58. The customer was aware the new forklifts were arriving and were satisfied that they only needed the forklift to be operational until then.

59. In my opinion. the condition of the forklifts was still usable and safe. The tyres needed replacement, but could remain in usage for a few days when the new forklifts would arrive.

60. Obviously, my employer noticed the condition of the forklifts, but they could have confirmed the circumstances surrounding my duties at the site, instead of first notifying me during this toolbox meeting."

30. The applicant said he believed the old forklifts would be sold for parts, in accordance with what he described as standard practice for equipment of that age. He said the customer knew the new forklifts were arriving and was satisfied that the old ones only needed to be operational for a very short time. He described the conditions of the old forklifts as "still usable and safe. The tyres needed replacement, but could remain in usage for a few days when the new forklifts would arrive."

31. The applicant referred the letter to his union, the AMWU. The union provided advice to the applicant and submitted his reply to the respondent. According to the applicant, shortly thereafter the respondent advised him the investigation was ongoing. In or about early June 2018, the applicant states the respondent sent a further letter to the union, which in turn responded by requesting further information from the respondent regarding the investigation.

32. The correspondence between the respondent and the applicant is attached to the Application. The letter dated 24 May 2018 from the respondent to the applicant was signed by Mr Anderson and sets out the alleged deficiencies in the servicing of the old forklifts. I do not propose to list those deficiencies in full. After setting out the allegations, the letter said:

> "Response
>
> In my capacity as the Investigation Officer, I am requesting that you prepare your written response to the allegations above by completing the Respondent Form enclosed and returning it to me no later than 9:00am on Tuesday, 29 May 2018.
>
> TMHA requires this information from you in order to complete the investigation. The process of requiring you to formally respond in this manner enables the Investigation to be formally commenced and ensures that the investigation process complies with due process and affords natural justice to both you and the other parties involved.
>
> As an employee of TMHA who is subject to allegations of misconduct, you are required to comply with this lawful and reasonable direction. It is necessary for you to address in detail the allegations set out in the complaint.
>
> Investigation
>
> The Investigation will be conducted in a manner which affords natural justice and procedural fairness.
>
> Details will be obtained from any witnesses and all relevant information will be collected. Once the evidence has been collected, the Investigating Officer will make factual findings and will communicate this finding to the relevant Manager for the purpose of determining appropriate outcomes. Such outcomes may include disciplinary action or termination of your employment. You will be Informed of the key findings of the investigation as they relate to you.

Confidentiality

The Investigation is strictly confidential. In order to protect all parties, participants are reminded to maintain confidentiality about the fact that an investigation is being conducted and what the investigation is about. These confidentiality obligations apply equally to all parties.

Arrangements during investigation

You will be relocated to the Sydney Workshop effective Thursday, 24 May 2018. Your work will continue as normal during the investigation and you are expected to perform your usual duties and responsibilities.

While you remain in the workplace pending the outcome of the Investigation, your work will be closely supervised and monitored by your Manager. You are expected to perform your duties and the work as reasonably instructed by TMHA and in accordance with your skills and qualifications. Your quality of work will also be reviewed by your Manager.

You are required to cooperate with those conducting the investigation and to provide any information that may assist with the investigation."

33. The applicant's handwritten response to the respondent's letter is attached to the Reply at page 117. In addressing the allegations, the applicant said:

"I am a little disappointed that these issues were not brought to my attention at the time, not in this manner – 6-8 weeks later. I would have thought that my stature in this company would have afforded me that courtesy…

Mick Tsougranis was informed of major repairs, tyres etc. He advised to do just what was needed to keep them going as they were to be wholesaled off, and do so at minimal cost."

34. On 4 June 2018, Mr Anderson wrote to the applicant. He stated there "remained some ambiguity in regards to the incidents" of March 2018. Mr Anderson then wrote:

"In order for TMHA to further clarify the events that occurred and in accordance with the principles of natural justice and procedural fairness, you will be provided with a further opportunity to provide a response, to the following questions by close of business on Tuesday, 5 June 2018.

(Please address and respond to each question separately in your response):

It is alleged that on Tuesday, 13 March 2018 and Friday, 23 March 2018 your conduct was contrary to your contractual commitment to act in the best interest of the Company as well as being a breach of your duties as an employee. Further, such conduct would be considered dishonest, misrepresentative and have a high potential of jeopardising TMHA's relationships with its customers. If substantiated your conduct would also be considered a serious breach of the duties and obligations expected of you in your role of a Technician with TMHA, and therefore TMHA's Company Code of Conduct.

Further your alleged conduct is contrary to the reasonable instructions provided by TMHA and not in accordance with your duties as an employee as provided under Work Health and Safety policy and legislation."

Mr Anderson then requested details and clarification of the applicant's activities on 13 March 2018 and 23 March 2018. The letter then concluded:

> "Consequences of failing to provide proper response
>
> Please be aware, that it is in your interest to fully participate in the investigation process because if you do not provide a proper full response to the allegations, a decision will be made in relation to this investigation on the evidence currently available.
>
> Further, a failure to provide a proper response may also constitute a failure to follow a lawful and reasonable request by TMHA.
>
> If you have any questions about the investigation process, please do not hesitate to contact me."

35. On 5 June 2018, the Secretary of the NSW Vehicle Division of the AMWU replied to Mr Anderson in the following terms:

> "Firstly, I will deal with the issue of 'Procedural Fairness/ Natural Justice' to which your letter so correctly refers as being an integral part of the investigatory process. Given this position I would now seek a response to the following questions:
>
> - Why you have only given Wayne less than 24 hours to respond to the Second Letter? It was handed to him yesterday during work and he has only been given until the close of business today;
> - Why is it that this investigation is being conducted two months after the actual events? Your letters are very specific and are asking for quite significant detail. This concern is further compounded by the fact that it was indicated to Wayne at a tool box meeting soon after the alleged incidents that there was a problem. The investigation should have been commenced there and then when it was all fresh in the mind of Wayne;
> - Why have you not bothered to interview or talk to Mick Tsougranis - TMHA Area Manager (Sydney Markets)? This person is an integral part of this investigation and a key exculpatory witness to whom Wayne has referred and yet you have not even bothered to interview this person let alone have a discussion with him.
>
> All of the above are huge concerns, but perhaps the most important is the failure of TMHA to make the effort to interview Mick Tsougranis. This by itself challenges the genuineness and bona fides of TMHA's investigation.
>
> It is the position of the AMWU that Wayne has adequately responded to the First Letter of TMHA. For TMHA to now imply (via the Second Letter) that Wayne is being disingenuous is [sic] his response borders on an affront. More importantly, the Second Letter is even more heightened in terms of its threatening language. This is very unnecessary, especially toward an employee who has given almost 40 years of dedicated service to TMHA.

For the record, the AMWU is of the view that the allegations being levelled against Wayne are frivolous and vexatious; consequentially, the same are unequivocally and vehemently refuted. Given the factual context in which they have arisen, the AMWU is also of the view that they border on being malicious and/or defamatory.

Essentially it is the position of the AMWU that TMHA are unfairly targeting Wayne for the vocal and active role Wayne plays in defending and/or advocating for the rights of his own employment conditions and those of the other Road Service Technicians. Wayne has also been very active in voicing his concern about the current adverse workplace culture within TMHA. In fact, Wayne was recently prevented from bringing these concerns to the attention of TMHA CEO Steve Takis. This is the same Steve Takis who has sought the counsel of Wayne in years gone by.

Ultimately, the AMWU now holds the view that TMHA are moving to terminate the employment of Wayne. Given the seriousness of this view the AMWU will again be briefing its solicitors Maurice Blackburn to take the necessary and requisite legal action."

36. On 21 June 2018, Mr Anderson again wrote to the applicant. In that letter, he set out further allegations against the applicant which included "negligent work practices, falsifying service records, unacceptable and poor work standards and further instances of serious unsafe work practices." Mr Anderson then listed no fewer than seven forklifts on which the applicant had worked, and set out in detail the applicant's alleged failings in working on them. The work in question was carried out several months before the letter was written. Enclosed with the letter were the job cards relating to the forklift services and repairs. The letter then gave the applicant until 5.00 pm on 25 June 2018 to respond to the allegations.

37. On 25 June 2018, the AMWU replied to Mr Anderson's letter. That letter stated the applicant was absent from work owing to the injury at issue, and that he would not be replying to the letter of 21 June 2018 until such time as his doctor declared him fit to do so. The letter continued:

"Notwithstanding Wayne's present inability to respond, the AMWU has important questions of its own concerning the second letter of allegation, and to which it would now seek responses:

- Firstly, similar to the response of the AMWU to the first letter of allegation, why too are these allegations being investigated many months after the actual events? The AMWU holds the view that TMHA are trolling through Wayne's records and trying to uncover anything/everything that it can use as a basis for more allegations.

- Secondly, and following on from the first bullet point, can TMHA please confirm whether or not this will be the last letter of allegation that Wayne will receive?

- Can you please advise the AMWU of who checked these units and when they performed the said checks?

There is a final issue for which I would also seek a response. Can you please inform the AMWU if and/or when TMHA intends to respond to the questions contained in our previous letters to TMHA with respect its first letter of allegation? You would note that in my letter of 15 June 2018 I considered the lack of response to be most unprofessional and quite discourteous; given the time that has since lapsed, the opinion remains the same!"

38. On 2 July 2018, the AMWU again wrote to Mr Anderson and noted he had not responded to the questions raised in letters sent to him dated 5 June 2018, 7 June 2018, 15 June 2018 and 25 June 2018.

39. On 5 July 2018, the Australian Industry Group wrote to the AMWU on behalf of the respondent and addressed a number of the concerns raised by the union. It advised the AMWU that the applicant had an extension until 12 July 2018 to respond to the matters raised in the letter of 21 June 2018.

40. On 24 August 2018, the respondent wrote to the applicant advising of the outcome of the investigation. The letter advised the respondent had found all the allegations against the applicant proved and that:

> "After reviewing the investigation findings TMHA considers that the conduct in relation to the above allegations took place.
>
> Such conduct is viewed as very serious misconduct, and unacceptable to TMHA. Your conduct was not only dishonest, misrepresentative and negligent, it is also contrary to your contractual commitment to act in the best interest of the Company. Such conduct is considered a serious breach of the duties and obligations expected of you in your role of a Technician with TMHA, as well as TMHA's Company Code of Conduct and Work Health and Safety practices.
>
> In view of the findings and the seriousness of your misconduct, TMHA considers that there are sufficient grounds to terminate your employment, however a final decision has not yet been made. You are now provided with an opportunity to show cause as to why your employment with TMHA should not be terminated. If you wish to take this opportunity you must do so in writing by no later than 5pm on 31 August 2018."

41. On 31 August 2018, the AMWU replied to the respondent's letter of 24 August 2018. That letter is not before the Commission in these proceedings, however, it is apparent the letter contained the applicant's response to the findings of the investigation, because on 11 September 2018, the respondent sent the applicant a letter terminating his employment which noted it had "carefully considered the response made on your behalf by the AMWU in their letter dated 31 August 2018." The letter of termination stated:

> "It is TMHA's view that you have engaged in a pattern of seriously dishonest behaviour in that you have falsified service records including relevant job sheets, and misrepresented service activities performed by you. Your conduct has also created serious risks to the safety of persons and to TMHA's reputation. Such conduct is considered a serious breach of the duties and obligations expected of you in your role of a Technician with TMHA, as well as TMHNs Company Code of Conduct and Work Health and Safety practices, and constitutes serious misconduct."

The letter then indicated the respondent was within its rights to terminate the applicant's employment summarily, however, in light of his length of service, the respondent paid him five weeks' in lieu of notice and all accrued and untaken annual and long service leave entitlements (which I note the applicant would have received in any event, as they are statutory entitlements).

42. It is not in dispute that the applicant brought a claim for unfair dismissal. The deed of release relating to that claim is attached to the Reply.

43. The respondent's human resources advisor, Ms Agostino provided a statement dated 12 July 2018, found at page 19 of the Application. She stated that Mr Anderson notified her on 23 April 2018 of concerns surrounding the applicant's service of the two forklifts. At paragraph 13 and following, Ms Agostino said:

> "The specific items were listed in a document, which was quite substantial. It was very detailed and itemized. I'm unsure of the technical knowledge about these parts, but it was apparent from this meeting and speaking to Steve that Wayne had not carried out the service.
>
> 14. Steve would further investigate the matter and my involvement during this period was not required.
>
> 15. On 15 May 2016, I received an email from Steve advising me to draft an Investigation Letter to be issued to Wayne. Using the Information previously supplied by Steve, I drafted a letter Identifying the allegations and the work that he allegedly did not complete."

44. Ms Agostino indicates at paragraph 19 of her statement that Mr Anderson received the applicant's response to the initial investigation letter. She states she was requested to draft a letter to the applicant requesting further details. Ms Agostino then sets out her involvement in obtaining a response to inquiries from Mr Tsougranis, and in drafting a further letter to the applicant dated 21 June 2018, which set out the additional allegations against him.

45. Mr Anderson provided a statement dated 12 July 2018, attached to the Application from page 25. He noted the applicant was generally onsite at the Sydney Markets, as there is a large forklift customer base located there. Mr Anderson set out the circumstances surrounding the 2015 incident. He then set out the circumstances regarding the matters leading up to the applicant's termination.

46. Mr Anderson said the old forklifts were returned from the markets on 28 March 2018. They were allocated to the "Not in Operation Area" until the rental department would determine what to do with them. On 12 April 2018, two of the old forklifts were allocated to the respondent's workshops for preparation for short term hire. Mr Anderson states that the forklifts were reviewed by the workshop, and that owing to the large amount of work which was required to be carried out on them, they would not be ready to be rented out on the date required. This was despite the forklifts having service labels completed by the applicant dated 13 March 2018 and 23 March 2018 respectively, which would, according to Mr Anderson, mean the forklifts would not have required a great deal of work for them to be suitable for renting out on a short-term basis.

47. From paragraph 49, Mr Anderson said:

> "49. Wayne was most likely aware that the forklifts were being returned, but I do not know if he was aware of the dates. There wouldn't be an issue if he only logged the job card for the breakdown and nothing for the service, at least we would understand that it had not been serviced for a length of time.
>
> 50. He should have kept the forklift safe, but only repairing a breakdown and nothing else left the forklifts with a number of unsafe issues. The lift chains were in such a poor condition that it was questioned by the workshop whether it was inspected during the previous service by Wayne.

> 51. He should never have logged the service job-card, if he was never going to do any of the work. The units were going to be kept by us and therefore the work was going to be completed at some stage, whether onsite or in our workshop.
>
> 52. Wayne is not aware what the Rental Department intends to do with these units.
>
> 53. We have a process, should a technician attend a site and the forklift requires extensive work, a further short - term rental can be allocated to the customer until the newer model is provided.
>
> 54. There was nothing stopping Wayne from allocating the short-term rental, instead of falsifying documentation and leaving a sub-standard forklift with a customer. The Sydney Market forklifts are also registered for usage on Public Roads, unlike many other forklifts, therefore their safety standards are much higher."

48. Mr Anderson referred to the toolbox meetings in April 2018, and stated the machines referred to at those meetings were the ones which the applicant had worked on. Mr Anderson indicated he did not believe the applicant would have known that was the case at the time. He said he did not approach the applicant about the allegations without "first confirming that it was appropriate to do so and that the allegations were of a serious nature." It seems somewhat surprising that Mr Anderson needed to seek confirmation throughout May 2018 as to the seriousness of the allegations, given he had already deemed them sufficiently serious to draw them to the attention of the entire workforce at three separate toolbox meetings in April 2018.

49. In relation to the correspondence between the respondent and the AMWU, Mr Anderson noted the union had replied on behalf of the applicant in response to the letter of 4 June 2018 which requested further details from the applicant. Mr Anderson does not, however, deal with any of the matters raised by the union in their letter. Rather, at paragraph 75 of his statement, Mr Anderson said "Over the next 10 or so days the Union demanded further information, but we were awaiting a response from Wayne in respect of the allegations."

50. Michael Tsougranis provided an important statement, attached to the Application from page 37. He noted that the respondent had 1,000 forklifts operating within Sydney Markets. He said he did not have any direct involvement with servicing or maintenance, however, "if approached by a customer from within the Sydney Markets requesting to have a forklift serviced or repaired, I would pass on their details to Wayne Jarvis or to a technician that is available."

51. In terms of his working relationship with the applicant, Mr Tsougranis said it was not close, however, he said:

> "10. I have known Wayne since I commenced working TMHA. Throughout the years we have had a number of technicians appointed to the Sydney Markets, with Wayne being the technician covering our area for the initial few years when I started, before moving to another area as a technician and then returned to the Sydney Markets approximately 6-12 months ago.
>
> 11. The only complaints I would receive in relation to Wayne from the Sydney Market customers relate to his slow responses in arranging times and dates to complete the required work.
>
> 12. Besides the delay in arranging the repairs, I would not recall any other complaints.

13. Wayne would be performing his duties fulltime within the Sydney Markets. He has a designated workshop and would drive throughout the location completing his duties. He would also perform his duties outside of the Sydney Markets and therefore we only interact if we are in the same area.

14. I never had any issues or concerns with Wayne, but I am not a mechanic.”

52. Mr Tsougranis dealt with his conversation with the applicant regarding the forklifts which became the subject of the initial complaint. He said:

“INCIDENT

15. I do not recall the date, but it was several months ago. I noticed Wayne within the storage shed that contains various supplies, including forklift parts. As I approached Wayne, he said, 'The boys need tyres’ and then began to mention that they were receiving new machines.

16. I told Wayne, ‘They are definitely receiving new machines’ and he responded, 'When’ and I said, 'They shouldn't be too much longer, they are going through PDI in the workshop’.

17. PDI refers to the Pre-Delivery Inspection and is the final stage before delivery. Following PDI, I would then conduct an inspection to confirm that the order has been met correctly, before notifying the customer and we then arrange transportation.

16, Generally, if the machine passes all inspections, it would only take a week for everything to be completed. The only delay would relate to modifications to the forklift that need to be completed, before the customer can collect the forklift.

19. The customer was awaiting 4-5 forklifts and the customer would receive the new forklifts shortly thereafter, but I cannot confirm the date.

20. The forklifts in question in relation to the customer were on a long-tern rental. The basic term is 60 months, after the completion of the term and the customer has the option to upgrade or renew the current forklifts for a further term…

24. I do not know what issues the forklifts had when Wayne mentioned the tyres. I do not recall him mentioning anything else other than the tyres. I am not aware of the processes for the technicians and repairers in relation to circumstances such as this.

25. I do recall telling Wayne, ‘Just make sure they are safe. They have new machines coming’. When I said that comment it related to him disclosing the customer needed tyres, however, the new fleet forklifts would be delivered shortly.

26. I don't know what else was wrong with the forklifts or the reason for the repairs, as the customer would speak to him directly.”

53. I note the respondent has also included in the Reply from page 124 a letter sent to Mr Tsougranis dated 8 June 2018, and his response to the questions posed of him. After advising him that the respondent considered the allegations serious enough to warrant a formal investigation, the letter asked Mr Tsougranis the following:

"1. Did you instruct or advise Wayne Jarvis to specifically raise a preventative service job against the abovementioned equipment? If so what instructions or advice did you provide to him?

2. Did you instruct or advise Wayne Jarvis not to complete the preventative service for the abovementioned equipment? If so, what instructions or advice did you provide to him?

3. Did you advise Wayne Jarvis to 'do just what was needed to keep them going' in relation to the abovementioned equipment?

4. Did you inform Wayne Jarvis that the units were going to be wholesaled and request him to keep the costs associated with preventative service at a minimum?

5. What knowledge did you have of the units in question, including the operating condition of the units and the service and maintenance records of the unit?"

Mr Tsougranis replied in the following terms:

"1. No

2. No

3. I recall Wayne saying that he needed to organize a new set of tyres for one of the Australian Global Marketing units. He said that the boys from AGM were asking about their new forks.

I told Wayne that they were in PDI and will be ready for delivery soon. I did say that if it was safe to leave them as the new units were only days away.

4. No

5. They seemed to be working ok, I hadn't heard anything from the customer complaining about them." (My emphasis)

54. In terms of the processes concerning forklifts once they had been returned to the respondent's premises, Mr Tsougranis said he was not involved in deciding what happened to the used vehicles. He did, however, say that in his experience forklifts returned from the markets would accumulate greater hours than those used elsewhere, and were usually "returned in average condition, considering the hours the forklifts have been in usage."
`

55. Ms Suzie Albatti provided a statement, found at page 23 of the Reply and dated 12 July 2018. Ms Albatti is the respondent's National Human Resources (HR) Manager. She confirmed the applicant was the only technician at the Sydney Markets site. Taken with the statement of Mr Tsougranis, who indicated there were over 1,000 forklifts at the market site, it is apparent the applicant was responsible for servicing and repairing a very large number of forklifts.

56. Ms Albatti confirmed the Rental Co-ordinator (who has not provided a statement) requested the two forklifts be prepared and hired to a new customer. There is no evidence as to when how or why the co-ordinator came to the decision to rehire the forklifts in question. It was, Ms Albatti said, at this point it was discovered the forklifts had not been serviced.

57. Ms Albatti noted the matters were raised at toolbox meetings in April 2018. She then said at paragraph 36:

> "For the following few weeks the HR Department and Steve Anderson would begin to compile the evidence and prepare the allegations that required a response from Wayne.
>
> 37. Essentially, we had sought a response from Wayne on 24 May 2018. He provided his response on 29 May 2018, but further information was required, as his response did not adequately cover the initial allegations.
>
> 38. In summary, his response had alleged that he completed the breakdown work on these two units and was told by Michael the Sales Manager that the customer would receive a new fleet and not to carry out the work. He never addressed the submission and lodgement of the service requests and the time he spent servicing these units."

58. In relation to the further allegations, Ms Albatti states:

> "49. The recent allegations refer to seven other units that had been identified as having been serviced by Wayne, but during the inspection on 18 June 2018 they were found to have various concerns and in a very poor operating condition.
>
> 50. The further allegations were forwarded to Wayne and his Union Representative on 21 June 2018.
>
> 51. We have not heard from Wayne and we had allocated an expected response date, but it has not been met. We extended the due date for his response which expires on 12 July 2018.
>
> 52. The investigation is ongoing and we are allowing Wayne to contribute to the investigation and to provide the required responses to the allegations.
>
> 53. We are providing procedural fairness, but providing us with a response, rather than us insinuating the reason behind each action."

59. In a second statement dated 10 April 2019, the applicant replied to Ms Albatti's statement. He said at paragraph 9:

> "(a) It was not meant that these forklifts were to be prepared and rehired for a different customer. They were to be dehired and sold off as they were at the end of their working life.
>
> (b) With regard to the service and repair jobs, Mick Tsougranis, the sales manager, never told me not to service forklifts after I informed Mick how bad they were. He informed me only to do what "needed to be done to keep them going".
>
> (c) This was my understanding of what was to happen with these two units. They were to be sold off and dehired. They were not to be continued in circulation and provided to other business contacts as they were so old and worn.
>
> (d) The jobs cards for the services can only be raised by the office at my request.

(e) The repairs to these units can be either raised by the office or me.

(f) I would not have been working on these units if I had not been called to repair them.

(g) The quality of the job that I performed was more than adequate to keep them going for the short term. They were expected to last. The suggestion that I left them in a condition to be rehired is incorrect.

(h) My instructions was [sic] only to prepare them for dehiring and continued use for a short period of time, for example the tyres were passed their wear limit and the seat as worn out."

60. In his second statement, the applicant also deals with Mr Anderson's evidence. In so doing, he maintains his position that the two forklifts which were returned to the respondent in March 2018 were set to be decommissioned rather than rehired. It is in this context, the applicant states, that he signed off on the forklifts having been serviced, as he believed the units were not to be rehired. He said that items such as repairing or replacing the lift chains would have been attended to if he had known the forklifts were to be rehired, "as this is a safety item. I did not attend to these as the forklifts were to be decommissioned."

61. Consistent with his first statement, the applicant said that contrary to the assertion at paragraph 52 of Mr Anderson's statement, the applicant knew the forklifts were to be sold for parts because "Mick Tsougranis said they were to be decommissioned." He questioned Mr Anderson's conduct of the investigation, and said at paragraph 35:

> "The usual course of events is to ring me/technician in the first instance before it even gets to the process of an investigation. This is to establish why the certain issue had arisen. I refute paragraph 59 [where Mr Anderson asserts the applicant would not have known the forklifts being discussed at the toolbox meeting were the ones in issue] in my opinion it was obvious to myself that they were the units I had worked on. I was not afforded an appropriate opportunity to respond to the investigation…
>
> 37. Conducting the investigation is completely contrary to the processes that we had in play for the past 37 years and it is my belief that the investigation was conducted as there was a targeting of myself."

62. Concerning the statement of Mr Tsougranis, the applicant maintained he was informed by Mr Tsougranis that the forklifts in issue were to be "wholesaled off." Otherwise, he substantively agreed with Mr Tsougranis, particularly the comment that he told the applicant to "just make sure they are safe as they have new machines coming."

The medical evidence

63. There is no issue the applicant suffered a psychological injury. The applicant's Independent Medical Examiner (IME) Dr Rastogi, provides an opinion which broadly supports the contention that it was the disciplinary and performance management action towards the applicant from early 2018 which wholly caused his injury. At page 8 of the Application, Dr Rastogi says:

> "His employment was the main contributing factor for development of his psychiatric injury and he did not have any premorbid predisposing psychiatric vulnerabilities…

> The history, examination, his statement and review of notes by his treating specialists indicate that the cause of his psychiatric injury was conflict with his new manager since 2015 due to feeling threatened by his seniority and false allegations made against Mr Jarvis in 2018 for failure to repair the forklifts and mismanagement by line managers and not being provided with an opportunity to discuss his grievances or acknowledge him. He has been with this work place for 30 years and never had performance issues, hence his injury does not appear to be caused by administrative action."

Dr Rastogi also commented on whether the actions of the respondent were reasonable. I do not believe that is within his purview, and I disregard any opinion regarding the "reasonableness" element of the defence under section 11A.

64. The applicant's treating psychiatrist, Dr Khan, also provided an opinion in which he set out a history broadly consistent with that obtained by the other doctors. That is, it was the disciplinary action taken by the respondent leading up to the applicant's dismissal which caused his injury, although Dr Khan classifies that action as "administrative action." Dr Khan also provides an opinion as to the reasonableness or otherwise of the action taken by the respondent, and I disregard that portion of his report.

65. Dr Lim, the applicant's general practitioner also identifies the disciplinary actions taken by the respondent as being causative of the applicant's injury. That opinion accords with Dr Teoh, IME for the respondent who also states the applicant's issues are in response to action taken by the respondent "in respect of the misconduct allegations and subsequent investigation of such allegations."

66. Dr Teoh, IME for the respondent, provided a report in which he stated the applicant was suffering from emotional distress which could not be characterised or diagnosed under DSM V. I note the respondent has conceded injury, so that conclusion of Dr Teoh is not pressed. Nevertheless, Dr Teoh stated the cause of the applicant's distress was in response to the action taken by the respondent "in respect of the misconduct allegations and subsequent investigation of such allegations." That observation by Dr Teoh is consistent with those of Dr Lim and Dr Khan as to causation.

SUBMISSIONS

The applicant's submissions on liability

67. For the applicant, Mr Morgan set out the elements of the defence under section 11A. He noted the applicant had been employed by the respondent for nearly 40 years, and had been active in industrial negotiations with the respondent on behalf of its employees. Mr Morgan emphasised that in nearly four decades of service, the only disciplinary issue which had arisen with the applicant was the 2015 issue.

68. Mr Morgan submitted that the respondent had identified issues relating to the old forklifts as early as March 2018, but spent two months investigating the matter before details of the allegations were put to the applicant. He submitted both that delay and the manner in which the applicant was confronted with the allegations – being called back to Moorebank under the auspices of picking up a new uniform – were unreasonable. Additionally, Mr Morgan noted the first letter stipulated the applicant's employment may be in jeopardy even before he had been given an opportunity to respond to the allegations, and said it was unreasonable for the respondent to request the applicant provide further information within 24 hours of the respondent's second letter, particularly when the letter requesting that response includes a reference to the applicant's employment of nearly 40 years being in jeopardy.

69. Mr Morgan took the Commission to the decision of Deputy President Roche in *St George Leagues Club Ltd v Wretowska* [2013] NSWWCCPD 64 (*Wretowska*), and submitted the situation in these proceedings was analogous. In that matter, a longstanding employee had been subject of disciplinary action, including being told to attend a meeting at which the future of her employment was to be discussed. The Deputy President noted at paragraph 174:

> "I would have thought that, as a matter of basic fairness, the Club would have investigated these matters, and obtained signed statements, before telling an employee of long standing, who had not previously come under adverse notice for matters of this kind, that she was to attend a meeting with senior management to discuss not continuing her employment.
> In this context, the Arbitrator's reference to the absence of a full investigation was a matter he was entitled to consider in determining reasonableness."

70. In terms of the investigation which took place, Mr Morgan submitted it was inadequate and unreasonable. He said no one approached the applicant before the toolbox meeting about the work carried out on the two forklifts, in order to get his perspective. Likewise, Mr Morgan noted that the employer had between the return of the forklifts in March until late May 2018 to conduct an investigation, yet gave the applicant a mere five days to respond to what is described in its letter to him as serious allegations. Moreover, Mr Morgan noted those five days included only three workdays.

71. The applicant submitted the respondent also acted unreasonably in delaying the investigation for as long as it did. Mr Morgan said rather than deal with the issues when they were fresh in the applicant's mind, the respondent conducted a two-month investigation before speaking with the applicant, then presented the results of that investigation to him as a fait accompli.

72. Mr Morgan submitted the respondent had not satisfied the requirement of its disciplinary actions being the whole or predominant cause of the injury, given the applicant indicated there were longstanding issues surrounding the workplace culture, and that he had difficulties with Mr Anderson which predated even the March 2018 toolbox meeting, which was the first time he felt unease at the issue of the forklift servicing being mentioned in front of his colleagues.

73. Mr Morgan submitted that if the Commission found the actions of the respondent regarding discipline and/or performance were wholly or predominantly the cause of the applicant's injury, then they could not be reasonable given:

- The matters were raised at a toolbox meeting without consulting the applicant;
- The applicant was given the letter under a ruse of being provided with a new uniform;
- He was given five days to respond, two of which were a weekend;
- He responded and was then told the response was inadequate before receiving one day to expand on his initial response, when his employment is on the line;
- The union's concerns are not addressed and the respondent says it will investigate, and
- The applicant's employment was then terminated.

The respondent's submissions on liability

74. Mr Barnes noted the applicant took issue with the respondent's failure to speak with Mr Tsougranis about the matter until June 2018, however, he pointed out that until the applicant responded to the matters, the respondent had no reason to believe Mr Tsougranis had any involvement in the matter at all.

75. In relation to the allegations against the applicant, Mr Barnes said they were similar in nature to those surrounding the 2015 incident, as they involved the inaccurate completion of work records.

76. The respondent submitted the applicant's recollection of his conversation with Mr Tsougranis was false, given the latter's version of events. Mr Barnes submitted that Mr Tsougranis' statement about leaving the forklifts and just making them safe was only in relation to the tyres, and not to any other parts of the units which required servicing.

77. Mr Barnes noted that an examination of a defence under section 11A required the Commission to examine not only the outcome of any investigation, but also the process undertaken. He referred the Commission to the extensive investigation carried out by Mr Anderson, and the steps taken to give the applicant an opportunity to reply to the allegations made against him. Mr Barnes noted that of the additional 10 units which were inspected by the respondent, there were deficiencies in seven of them.

78. Mr Barnes referred the Commission to the decision in *Northern NSW Local Health Network v Heggie* [2013] NSWCA 255 (*Heggie*), and in particular to the matters set out in that decision regarding reasonableness. He noted the decision of Deputy President Snell in *Edwards v Secretary, Department of Education* [2016] NSWWCCPD 45, in which the Deputy President noted that a process may be reasonable, even if a step within that process is not.

79. Mr Barnes said the weight to be given to any one step in a process of disciplinary action will depend on the circumstances of the case, and that when one examined the totality of the process and the outcome in this matter, the Commission would have little difficulty in finding the causative actions of the respondent relating to discipline and performance appraisal were reasonable, particularly in light of the applicant having previously received a final warning, his credit being in issue and his conduct in relation to the 2018 matters being both egregious and misrepresentative and an example of a "well-worn path" of such dishonest conduct.

The applicant's submissions in reply

80. Mr Morgan submitted it was unfair to attack the applicant's credit in circumstances where he had been employed for 37 years with the respondent. He said the use by the respondent of terms such as "fraudulent" and "egregious" were totally inappropriate, as was the statement the issues in question were a "well-worn" path for the applicant. This is particularly the case, said Mr Morgan, when the respondent noted there had been no other issues raised concerning the applicant's conduct other than the 2015 incident. He submitted that the respondent painting a long-term employee in such a manner was disgraceful.

81. Mr Morgan submitted that at worst for the applicant, the matters surrounding the two forklifts which led to the investigation were a miscommunication between he and his manager. He said that if the respondent had approached its investigation with an open mind, it would have seen there was no question Mr Tsougranis told the applicant to do enough to just keep the forklifts safe until the new units were delivered.

82. The applicant submitted the Commission would not prefer Ms Tsougranis' version of his conversation with the applicant, given his recollection of a different set of facts comes about only after he receives a letter from Mr Anderson describing the allegations against the applicant as "serious." Mr Morgan said that the applicant's recollection of his conversation with Mr Tsougranis and being told to "keep them safe" has a ring of truth to it which the Commission should accept. Mr Morgan noted that Ms Tsougranis accepted he made that comment, but that he only said it in relation to the forklifts' tyres.

83. Mr Morgan submitted that when one examined the totality of the circumstances of this matter, the Commission would not be satisfied the respondent has discharged its onus on the balance of probabilities to demonstrate its actions were reasonable.

Submissions relating to capacity for employment

84. The respondent submitted the applicant had capacity for employment from 2 September 2018, which is the date of Dr Teoh's report. In that document, Dr Teoh records the applicant as having told him he could return to work but "was concerned about how it could be managed." Mr Barnes submitted that this evidence should be accepted, and that any incapacity ended as at the date of Dr Teoh's report.

85. Mr Barnes also noted Dr Rastogi said at page 85 of the Application that the applicant has capacity to work in future at a different organisation. That report is dated February 2019.

86. I note, however, that Mr Morgan pointed out the comments of Dr Rastogi relate to potential future capacity, rather than the applicant's current ability to work at February 2019. In this regard, I note at page 86 of the Application, Dr Rastogi was asked:

> "Your opinion as to whether our client is fit to work and if so, how many hours per day and days of the week. Please comment also on what restrictions should be placed on our client's duties if they are able to be undertake employment"

Dr Rastogi replied:

> "I am of the opinion that the client is currently unfit to work in any capacity but holds capacity to work in future in premorbid role and duties with restrictions."

87. Mr Morgan submitted that the balance of the medical evidence establishes the applicant was unfit for employment for the entire period of the claim, namely from 15 June 2018 to 14 June 2019. He relied on not only the opinion of Dr Rastogi, but also the opinion of Dr Lim, who said in his report dated 28 November 2018 that the applicant will "require psychological stabilisation prior to returning to some sort of work." He also relied on the WorkCover medical certificates of Dr Lim and the opinion of Dr Khan, treating psychiatrist, who in his report dated 30 October 2018 said:

> "Should the work-related stressors contributing to his psychiatric/psychological injury be dealt with appropriately and should Mr Jarvis receive the necessary support, it is expected that he would obtain clinical remission from his adjustment disorder within the next 6 months to 12 months."

DISCUSSION

Section 11A

88. Section 11A(1) of the 1987 Act provides:

> "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."

89. "Psychological injury", in the context of section 11A(1), is defined in subs (3) in the following terms:

> "A psychological injury is an injury (as defined in section 4) that is a psychological or psychiatric disorder. The term extends to include the physiological effect of such a disorder on the nervous system."

90. An employer who seeks to make out a defence pursuant to section 11A carries the onus of establishing that defence: *Pirie v Franklins Ltd* [2001] NSWCC 167; (2001) 22 NSWCCR 346 (*Pirie*); and *Department of Education and Training v Sinclair* [2005] NSWCA 465; (2005) 4 DDCR 206 (*Sinclair).*

91. It is important to recognise that "wholly" and "predominantly" are separate concepts and a finding of one or the other needs to be considered. In *Smith v Roads and Traffic Authority of NSW* [2008] NSWWCCPD 130 (*Smith*) the arbitrator at first instance made a finding that the subject injury was "wholly" or "predominantly" caused by action taken by the respondent employer. Snell ADP said at [62] that the concepts "wholly" and "predominantly" are different concepts and if such findings were to be made "it needed to be one or the other".

92. The phrase "wholly or predominantly caused" has been held to mean "mainly or principally caused". The test of causation to be applied is that described in *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452; (1994) 10 NSWCCR 796; that is a common-sense evaluation of the causal chain.

93. In *Hamad v Q Catering Limited* [2017] NSWWCCPD 6 (15 March 2017) (Hamad) the respondent employer was unable, on the available evidence and in the absence of any medical evidence dealing appropriately with the topic, to discharge its onus in proving the worker's psychological injury resulted 'wholly or predominantly' from its reasonable action to be taken or proposed to be taken with respect to discipline.

94. The effect of the decision in *Hamad* is that reliance on factual material alone will not always be sufficient to make out a section 11A defence. Where factual evidence is adequate, it is often in cases where there is an allegation of a single event which has given rise to psychological injury.

95. As already noted, in this matter the medical evidence is virtually unanimous in stating the respondent's actions with regards to discipline and/or performance wholly caused the applicant's injury. The doctors all note the applicant had no signs of any pre-existing condition, and all state that the events leading up to the applicant's dismissal were the cause of his injury. In the circumstances, I have no difficulty finding on the balance of probabilities that the actions of the respondent relating to discipline and performance appraisal were wholly the cause of the applicant's injuries.

96. Those findings are supported by the applicant's own evidence, in which he indicates the manner in which he was treated by management in relation to the alleged misconduct from the time of the toolbox meeting in April 2018 onwards caused him increased difficulties. In his first statement, the applicant says he consulted Dr Lim on 15 June 2018 as he had been struggling to sleep, was stressed and was "remaining quiet, distant and useless."

97. To successfully raise a defence under section 11A, the respondent must not only show the requisite causal connection between its actions and the applicant's injury, it must also satisfy the Commission that its actions were reasonable.

98. Considering the meaning of reasonableness, Geraghty J in *Irwin v Director-General of Education* NSWCC 14068/97, 18 June 1998 (*Irwin*) said:

> "…the question of reasonableness is one of fact, weighing all the relevant factors. That test is less demanding than the test of necessity, but more demanding than the test of convenience. The test of 'reasonableness' is objective and must weigh the rights of employees against the object of the employment. Whether an action is reasonable should be attended, in all the circumstances, by questions of fairness."

99. In *Ivanisevic v Laudet Pty Ltd* (unreported, 24 November 1998), Truss CCJ said:

> "In my view when considering the concept of reasonable action, the Court is required to have regard not only to the end result but to the manner in which it was effected."

100. These passages were quoted with approval by Foster AJA (Sheller and Santow JJA agreeing) in *Commissioner of Police v Minahan* [2003] NSWCA 239; 1 DDCR 57 (*Minahan*), where his Honour said:

> "I prefer the construction which has been accorded to it in the decisions in the Compensation Court referred to in this judgment and in his Honour's judgment. The words 'reasonable action', in a statute dealing with Workers Compensation rights of employees should be given a broad construction, unfettered by considerations as to whether the employee can or cannot also bring an action at common law against the employer, founded upon breach of a duty of care." (at [42])

101. In *Ritchie v Department of Community Services* [1998] 16 NSWCCR 727 (*Ritchie*), Armitage J, said:

> "It is apparent that the test in this case is an objective one where one must weigh the consequences of the Respondent's conduct against the reasons given for it. It follows of course from the objective nature of the test that the evidence given by the Applicant as to the perceived unreasonableness of the Respondent's conduct or from the Respondent as to the reasonableness of its conduct from its perspective will not be determinative of this issue."

102. Reasonableness is judged having regard to fairness appropriate in the circumstances, including what went before or after a particular action (Burke J in *Melder v Ausbowl Pty Ltd* [1997] 15 NSWCCR 454). Armitage J in *Jackson v Work Directions Australia Pty Ltd* [1998] NSWCC 45 stated "only if the employer's action in all the circumstances was fair could it be said to be reasonable." (see also *Heggie*, where it was held that the reasonableness of a person's actions is assessed by reference to the circumstances known to that person at the time the action is taken.)

103. In *Heggie*, Sackville JA set out the following statements of principle regarding section 11A:

> "59. The following propositions are consistent both with the statutory language and the authorities that have construed section 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 section 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."

FINDINGS AND REASONS

Wholly or predominantly

104. In my view, the evidence in this matter satisfies the requirement of the applicant's injury being wholly or predominantly caused by the respondent's actions with regards to discipline. I note the applicant states he had difficulties with Mr Anderson before the 2018 incidents, however, there is no evidence that any interaction with management during that time was causative of his injury. Rather, it appears that the course of conduct initiated by the respondent from April 2018 was the main or principal cause of the applicant's injury.

105. To the extent it is suggested the applicant's problems began as and from the 2015 incident, I reject that contention. The evidence discloses the applicant was able to continue with his work duties, and indeed carried them out at an extremely busy work site at Sydney Markets without any suggestion his duties were causing him difficulties. Although Dr Rastogi notes a history of conflict between the applicant and his manager since 2015, the applicant's own evidence does not disclose that any issues between he and management were causing him difficulties before the March 2018 incidents and their aftermath. Rather, the respondent's action in relation to discipline from April 2018 and following was, in my view, wholly causative of the applicant's injury.

106. Regarding the suggestion that conduct relating to dismissal primarily caused the applicant's injury, I reject that submission. The applicant attended on his general practitioner some two months before he was dismissed from his employment. Rather, I find that the injury was wholly caused by the actions taken with regards to discipline.

107. The medical evidence which has been summarised above almost universally supports a finding that the applicant's now accepted injury was wholly caused by the actions of the respondent with regards to discipline. I accept the opinions of the experts with regards to causation, noting those views are consistent with the applicant's own evidence as to the onset of his symptoms. Although Dr Rastogi says the events of 2015 and their consequences played a part, I prefer the opinions of Dr Khan, Dr Teoh and Dr Lim on this aspect, namely that it was the actions of the respondent concerning the allegations of misconduct in 2018 which wholly caused the applicant's injury. Even were I to accept Dr Rastogi's view, I would find the respondent's actions regarding discipline from March 2018 onwards were the predominant cause of the applicant's injury.

Reasonableness

108. On the balance of probabilities, I do not believe the respondent's actions which caused the applicant's injury were reasonable. In my view, the manner in which the issues were raised by the respondent both at the toolbox meeting and in providing the applicant with a letter while he attended the Moorebank premises to collect a uniform at the behest of the respondent, were not reasonable.

109. Analogous to the circumstances in *Wretowska*, I would have thought that the respondent would have advised an employee of 37 years' standing of its concerns relating to his conduct as soon as practicable, rather than discuss it in general terms at a toolbox meeting before waiting a further month to provide him with a letter of investigation, couched as it is in what can only be described as very serious and accusatory language. I find it unreasonable of the respondent to take the approach which Ms Albatti sets out at paragraph 36 of her statement. If, as Ms Albatti and Mr Anderson both state, it became apparent from as early as April 2018 that the issue regarding the work which was or was not carried out on the old forklifts was very serious, in my view the reasonable approach would have been to put that issue directly to the applicant as soon as it arose, rather than to, in Ms Albatti's own words, spend a few weeks compiling evidence and preparing allegations for the applicant to answer.

110. I accept the applicant's evidence that he was aware Mr Anderson was speaking about the work he carried out on the old forklifts when he raised the matter at the toolbox meeting. Notwithstanding Mr Anderson's evidence to the contrary, he cannot know the mind of the applicant, who was a vastly experienced technician and who was aware of the work he had carried out. It is apparent from all the lay evidence in the case that it was an unusual circumstance for scheduled servicing not to be carried out. It is therefore not surprising, in my opinion, that the applicant would have some recollection of the limited work carried out on the forklifts at issue.

111. Likewise, in my opinion the applicant's version of his conversation with Mr Tsougranis has a ring of truth to it. Both parties to the conversation recall Ms Tsougranis saying words to the effect that the applicant should only do what was necessary to keep the forklifts safe, as the client was only days away from receiving new ones. The parties differ as to whether Mr Tsougranis was referring to the servicing of the units in general, or specifically to the tyres.

112. I do not consider it necessary, in determining the reasonableness or otherwise of the respondent's' actions, to decide which of the parties' versions of the conversation to accept. In my opinion, it is apparent that at worst there has been a misunderstanding between the applicant and Mr Tsougranis as to what the latter meant by his comment to "leave" the forklifts if it was safe to do so. In my view, that misunderstanding is innocent and understandable. For the respondent to assume, armed with Mr Tsougranis' statement confirming he had said words almost entirely consistent with those recounted by the applicant, that the applicant had acted dishonestly in performing only minimal work on the old forklifts is, in my opinion, unreasonable.

113. To the extent I am required to make a finding relating to the applicant's conversation with Mr Tsougranis, I prefer the applicant's version. Given both parties to the conversation acknowledge Mr Tsougranis told the applicant to just do enough to keep the forklifts safe, it stands to reason the applicant would interpret that comment to relate to the forklifts as a whole. That interpretation is consistent with his only carrying out the necessary work for the forklifts to last a few days until the new units arrived.

114. It seems incongruous that Mr Tsougranis would tell the applicant to only do enough to keep the forklifts safe, but that this statement would only relate to their tyres. It is not as though only certain parts of the forklifts were to be replaced within a matter of days; they were to be removed from the markets completely. I therefore reject the respondent's contention that Mr Tsougranis' comments regarding safety only related to the forklift tyres. It would be illogical for him to suggest the applicant not replace the tyres unless there is a safety issue yet for the applicant to be expected to carry out work on other parts, regardless of whether safety issues arose surrounding them.

115. Moreover, the respondent does not seem to suggest there is any issue with the applicant having not replaced the tyres. It must follow, that if it was acceptable for the applicant not to replace the tyres unless they were unsafe because of the impending forklift replacement, then in the interests of consistency, it must be acceptable for the applicant to avoid carrying out non-safety related work to other parts of the units.

116. Likewise, I accept the applicant's evidence that he was told by Mr Tsougranis that the old forklifts would be decommissioned. That finding is also consistent with the applicant only carrying out limited work on them, as he was of the genuine belief they were to be decommissioned and sold off for parts.

117. Turning to the manner in which the disciplinary investigation was carried out, I note that consistent with the decision in *Heggie*, the test of reasonableness is objective. It therefore does not matter whether the applicant or respondent believe the disciplinary actions were reasonable. What is necessary, as noted in *Ritchie*, is a process of weighing up the consequences of the respondent's actions with the reasons given for them.

118. In examining the conduct of the respondent, I find that it falls short of that which is reasonable in the circumstances of this case. In assessing reasonableness, it is appropriate to take into account the timing of any investigation. In this matter, Mr Anderson's first letter to Mr Tsougranis is instructive. It refers to incidents which the respondent says took place on 13 March 2018 and 23 March 2018 and says, "Given the seriousness of the incidents, TMHA has decided to conduct a formal investigation into the incidents." The incidents in question were apparently deemed sufficiently serious by the respondent to warrant a formal investigation with consequences for the applicant's employment, yet it waited until 24 May 2018 before advising the applicant of the allegations and launching its investigation into them. In the intervening period, the conduct was used, in anonymous terms, as an example of what not to do for all relevant staff at toolbox meetings.

119. The tone and contents of Mr Anderson's letter dated 21 June 2018, given it purports to relate to an ongoing investigation, are nothing short of extraordinary. As an example, the letter accuses the applicant of being involved in "fraudulent activities by falsifying service records including relevant job sheets and misrepresenting service activities." It then states that the conduct "if substantiated, would be contrary to your contractual commitment to act in the best interest of the Company." Whilst purporting to notify the applicant of an investigation in progress, the letter includes comments to the effect that the service documentation can "only have been completed by you" and that additional repairs having to be carried out by the respondent was a "totally unacceptable" situation. On any objective reading of the respondent's letters, it is apparent Mr Anderson had made up his mind as to the outcome of the investigation before the applicant had been afforded the opportunity to respond to it. Such conduct is in no way reasonable, and the attitude behind it is a feature of the respondent's conduct which caused the applicant's injury.

120. The respondent's response to the concerns raised by the AMWU, which the respondent knew was representing the applicant in relation to the disciplinary investigation, is also instructive. Relevantly, at no point in her statement does Ms Agostino make mention of being made aware of or addressing the concerns raised by the AMWU relating to Mr Anderson's investigation in its letters dated 5 June 2018, 25 June 2018 and 2 July 2018. This is despite her role as a human resources advisor. It follows from this omission that either Mr Anderson had not passed onto Ms Agostino the AMWU's letters, or she had received them but chose to ignore the concerns raised in that correspondence. By any measure, either course of action is not reasonable.

121. It is apparent from paragraph 75 of his statement that Mr Anderson had no intention of replying to the matters raised by the AMWU in its letters to him. He acknowledges that the union was representing the applicant, and is aware it had requested further information from him, but wilfully ignored those requests for information, and did not provide a response to them. In the context of allegations which Mr Anderson had communicated to the applicant as being regarded as very serious and which could affect his future employment, in my view it is in no way reasonable for an employer to avoid replying to requests for information from an employee's representative.

122. Mr Anderson's statement indicates that the decision to examine other services carried out by the applicant was made by management at a meeting held on 15 June 2018, at which time an examination of 10 forklifts serviced by the applicant in May 2018 was carried out. In other words, despite Mr Anderson indicating the respondent had not yet concluded its investigation into the initial issues and not responding to the applicant's representatives' concerns about those matters, the respondent proceeded to examine the work carried out by the applicant in May 2018, without informing him it was intending to do so. In so doing, the respondent deliberately escalated and widened its investigation before its initial parameters had been fully examined and tested.

123. It follows from the above findings that I do not regard as reasonable the respondent's conduct with regards to discipline, performance or dismissal. In my view, Mr Anderson's investigation was to a large extent predetermined and the language and tone which he adopted in dealing with the respondent and his representatives was not reasonable.

Capacity

124. Given the above findings, it is necessary to examine the applicant's capacity for employment for the period 28 September 2018 to 14June 2019.

125. On balance, and taking into account all of the lay and medical evidence, I am satisfied the applicant was totally incapacitated for the period of the weekly benefits claim, namely 15 June 2018 to 14 June 2019. This is because the applicant's treating doctors, while providing a positive prognosis, make it clear that his return to work is conditional upon the removal of stressors and/or his placement into a different work environment in the future. The medical evidence discloses an ongoing incapacity in the applicant up to and including the time of the writing of the reports, and does no more than indicate the potential for a positive outcome in the future.

126. In reaching this finding, I prefer the views of Dr Rastogi, whose opinion correlates with the applicant's treating practitioners, Dr Khan and Dr Lim. I reject the view of Dr Teoh concerning capacity, noting Dr Teoh said the applicant was fit to return to work from a psychiatric perspective. That opinion was provided in the context of Dr Teoh indicating the applicant suffered from "emotional distress" and did not meet the requirements for a relevant psychiatric or psychological diagnosis under the DSM V criteria. I note this is a position abandoned by the respondent, which admitted at the hearing that the applicant suffered an injury. Given Dr Teoh based his findings on capacity around the applicant's "emotional distress" being "a normal reaction to a stressful situation at work" as opposed to a (now admitted) psychiatric injury, I do not prefer Dr Teoh's view, given there is no issue the applicant in fact suffered a psychiatric injury. I find that Dr Teoh's opinion about the absence of an injury has coloured his view and, therefore, I find I cannot place weight upon his conclusions about the applicant's capacity for employment. For this reason, I prefer the opinion of Dr Rastogi to that of Dr Teoh, and as I have stated above it is consistent with that of Drs Khan and Lim.

127. Given these findings, and the fact the applicant's wages schedule is not contested, I find the applicant's preinjury average weekly earnings (PIAWE) were $2,128.50. The applicant was paid compensation up to 27 September 2018, and accordingly the period of the claim is from 28 September 2018 to 14 June 2019. The period in issue is entirely within the second compensation period pursuant to section 37. Accordingly, the relevant rate of compensation is 80% of the applicant's PIAWE. In this case, that figure is $1,702.80. The Commission will therefore order the respondent to pay weekly compensation for the period 28 September 2018 to 14 June 2019 at the rate of $1,702.80 per week.

Medical and treatment expenses

128. Mr Morgan amended the claim for medical expenses to seek a general order. Given the Commission's findings on liability, there will be an order that the respondent pay the applicant's reasonably necessary medical and treatment expenses upon production of accounts, receipts and/or Medicare Australia Notice of Charge.

SUMMARY

129. The Commission will make the following findings and orders:

(a) The applicant suffered an injury as a result of the nature and conditions of his employment with the respondent with a deemed date of injury of 15 June 2018;

(b) The injury referred to in (a) above was wholly caused by the actions of the respondent with regards to discipline;

(c) The actions of the respondent referred to in (b) above were not reasonable;

(d) The applicant's PIAWE was $2,128.50 per week;

(e) The applicant suffered total incapacity for employment between 15 June 2018 and 14 June 2019 as a result of the injury referred to in (a) above;

(f) The applicant was paid weekly compensation between 15 June 2018 and 27 September 2018;

(g) The respondent is to pay the applicant weekly compensation for the period 28 September 2018 to 14 June 2019 at the rate of $1,702.80 per week (being 80% of the applicant's PIAWE), and

(h) The respondent is to pay the applicant's reasonably necessary medical and treatment expenses upon production of accounts, receipts and/ or Medicare Australia Notice of Charge.